No. _____

In The

Supreme Court of the United States

WILLIAM MAX NICHOLSON,

Petitioner,

vs.

THE STATE OF SOUTH CAROLINA,

Respondent.

On Petition For Writ Of Certiorari To The South Carolina Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

JOHN S. NICHOLS
BLUESTEIN & NICHOLS, LLC
1614 Taylor Street
Post Office Box 7965
Columbia, South Carolina 29202
(803) 779-7599 Fax: (803) 779-8995

Attorney for Petitioner William Max Nicholson

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

I. Does the decision of the South Carolina Court of Appeals upholding the trial court's refusal to strike Juror No. 98, thereby requiring Petitioner to use a peremptory challenge to dismiss the juror, deprive Petitioner of Due Process of Law as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution?

II. Does the decision of the South Carolina Court of Appeals upholding the trial court's refusal to suppress the testimony of an expert witness presented by the State whom the State disclosed on the eve of trial, and the trial court's denial of a continuance under the facts and circumstances of this case, deprive Petitioner of Due Process of Law as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution?

III. Does the decision of the South Carolina Court of Appeals upholding the Petitioner's conviction where the trial court became an advocate for the State by instructing the Solicitor as to how to properly lay a foundation for crucial audiotape evidence, under the facts and circumstances of this case, deprive Petitioner of Due Process of Law as guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution?

IV. Does the decision of the South Carolina Court of Appeals upholding the Petitioner's conviction where the trial court limited Petitioner's cross-examination of the alleged victim deprive Petitioner of Due Process of Law as guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, as well as his right to confront witnesses against him, as provided by the Sixth and Fourteenth Amendments?

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, the Parties to the Proceeding are:

WILLIAM MAX NICHOLSON, an individual;

THE STATE OF SOUTH CAROLINA, a sovereign State of the United States of America.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
CITATION OF REPORT OF OPINION ENTERED IN THE CASE	1
BASIS FOR SUPREME COURT JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE	2
STATEMENT OF THE CASE	2
ARGUMENT	4
I. The Trial Court's Refusal to Strike Juror No. 98, Thereby Requiring Petitioner to Use a Peremptory Challenge to Dismiss the Juror, Deprived Petitioner of Due Process of Law as Guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution	4
II. The Trial Court's Refusal to Suppress the Testimony of the State's Expert Witness and the Trial Court's Denial of a Continuance Under the Facts and Circumstances of this Case, Deprived Petitioner of Due Process of Law as Guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution	7

TABLE OF CONTENTS – Continued

Page

III. Trial Court Became an Advocate for the State by Instructing the Solicitor as to How to Properly Lay a Foundation for Crucial Audiotape Evidence Under the Facts and Circumstances of this Case, So as to Deprive Petitioner of Due Process of Law as Guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution 10

IV. The Trial Court Improperly Limited Petitioner's Cross-examination of the Alleged Victim in Violation of Petitioner's Rights of Due Process of Law as Guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, as Well as His Right to Confront Witnesses Against Him as Provided by the Sixth and Fourteenth Amendments 12

CONCLUSION 16

APPENDICES

South Carolina Court of Appeals Opinion: *State v. William Max Nicholson*, 366 S.C. 568, 623 S.E.2d 100 (Ct. App. 2005), *certiorari denied*, Feb. 14, 2007 ..... App. 1

TABLE OF AUTHORITIES

Page

STATE CASES

Asbury v. State, 765 So.2d 965 (Fla.Dist.Ct.App. 2000) 11

Green v. Maynard, 349 S.C. 535, 564 S.E.2d 83 (2002) 6

Owens v. State, 750 N.E.2d 403 (Ind. App. 2001) 11

State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) 6

State v. Matthews, 291 S.C. 339, S.E.2d 444 (1986) 6

State v. Nicholson, 366 S.C. 568, 623 S.E.2d 100 (Ct. App. 2005) 1, 7, 9, 12, 16

State v. Riels, 216 S.W.3d 737 (Tenn. 2007) 11

FEDERAL CASES

Brady v. Maryland, 373 U.S. 83 (1963) 9, 13

Chambers v. Mississippi, 410 U.S. 284 (1973) 9

Clark v. Arizona, 126 S.Ct. 2709 (2006) 15

Crawford v. Washington, 541 U.S. 36 (2004) 15

Estelle v. Williams, 425 U.S. 501 (1976) 8

Holmes v. South Carolina, 547 U.S. 319 (2006) 15

Hunter v. U.S., 62 F.2d 217 (5th Cir. 1932) 11

Irvin v. Dowd, 366 U.S. 717 (1961) 5

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) 11

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) 5, 8

U.S. v. Jackson, 204 F.3d 1118 (5th Cir. 1999) 5

U.S. v. Scott, 159 F.3d 916 (5th Cir. 1998) 5

TABLE OF AUTHORITIES – Continued

Page

U.S. v. Scull, 321 F.3d 1270 (10th Cir. 2003) 5

Wainwright v. Witt, 469 U.S. 412 (1985) 5

UNITED STATES CONSTITUTION

Amendment V, Due Process Clause 2, 12

Amendment VI, Due Process Clause 2, 12, 15

Amendment VI, Confrontation Clause 2, 15

Amendment XIV, Due Process Clause 2, 12, 15

FEDERAL STATUTES

28 U.S.C. § 1257 1

28 U.S.C. § 2101 1

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 13.1 1

Rule 13.3 1

Rule 29.6 ii

STATE RULES

Rule 5, SCRCrimP 13

CITATION OF REPORT OF OPINION ENTERED IN THE CASE

The State of South Carolina v. William Max Nicholson, 366 S.C. 568, 623 S.E.2d 100 (Ct. App. 2005), *reh'g denied*, Nov. 28, 2005, *cert. denied*, Feb. 14, 2007.

BASIS FOR SUPREME COURT JURISDICTION

The Petitioner William Max Nicholson was convicted of three (3) counts of second-degree criminal sexual conduct on October 24, 2002. The South Carolina Court of Appeals affirmed that conviction on July 5, 2005, and subsequently denied a Petition for Rehearing on November 28, 2005. Petitioner timely petitioned the Supreme Court of South Carolina to review the decision of the Court of Appeals. On February 14, 2007, the Supreme Court of South Carolina denied the Petition for Writ of Certiorari and on February 16, 2007, the South Carolina Court of Appeals remitted the case to the trial court. The present Petition is timely filed under 28 U.S.C. § 2101(d) and under Rules 13.1 and 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review on writ of certiorari the final judgment rendered by the highest court of a State in which the decision could be had, where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment V, Due Process Clause; Amendment VI, Due Process Clause and Confrontation Clause; and Amendment XIV, Due Process Clause.

STATEMENT OF THE CASE

This is a second degree criminal sexual conduct case. On December 20, 2001, the alleged victim, William Paul Wheeler (born March 25, 1980), accused the Petitioner of performing an act of fellatio upon him when the alleged victim was a student at West Oak High School. At the time of the allegation the alleged victim was nearly twenty-two (22) years of age, and the alleged acts allegedly took place approximately six (6) years earlier.

The alleged victim claimed his relationship with Petitioner began around August or September 1994, when the alleged victim enrolled in the ninth grade at West Oak. The alleged victim was assigned to a science class taught by Petitioner, a career teacher who was retired at the time of the complaint but still teaching at West Oak under a program known as the Teacher & Employee Retention Incentive (TERI) program. The alleged victim gave no reason for the delay between the time that the acts allegedly began and his complaint.

The alleged victim claimed that the acts started when the alleged victim was doing yard work for Petitioner at Petitioner's home in 1995, and continued into the alleged victim's adulthood. The alleged victim admitted that every

alleged act was consensual and Petitioner never forced himself upon the alleged victim.

Upon the advice and at the direction of the solicitor, law enforcement officers wired the alleged victim with a recording device and had the alleged victim arrange visits to Petitioner's home. Officers also instructed the alleged victim on how to elicit incriminating statements from Petitioner and, on each occasion, officers listened to the conversations from nearby by way of wire transmission. The visits took place on December 20 and 27, 2001, but failed to result in any direct admissions by Petitioner. However, Petitioner did not directly refute broad-ended statements the alleged victim made to Petitioner, which the Solicitor argued were tantamount to admissions that the alleged acts did, in fact, happen as the alleged victim claimed.

On October 24, 2002, following a trial a jury found Petitioner guilty of all charges and the trial court sentenced Petitioner to twelve (12) years in the South Carolina Department of Corrections.

Petitioner timely appealed his convictions and, on July 5, 2005, the South Carolina Court of Appeals affirmed the verdicts. Petitioner thereafter petitioned for rehearing before the Court of Appeals; and although the Court of Appeals admitted in its Order that it did not give full treatment to Petitioner's argument that the trial judge erred in limiting defense counsel's cross-examination of his accuser about the accuser's sexual abuse history, the Court denied rehearing. App. 76-77.

Petitioner subsequently petitioned the Supreme Court of South Carolina to issue a writ of certiorari to review the Court of Appeals decision. On February 14, 2007, the

Supreme Court of South Carolina denied the petition, and on February 16, 2007, the South Carolina Court of Appeals remitted the case to the trial court for entry of final judgment. This Petition follows.

ARGUMENT

I. The Trial Court's Refusal to Strike Juror No. 98, Thereby Requiring Petitioner to Use a Peremptory Challenge to Dismiss the Juror Deprived Petitioner of Due Process of Law as Guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution

As the trial court was qualifying the jury venire, juror No. 98, Charles D. Wood, revealed that his sister-in-law had been raped and that the perpetrators had "got away with it." (R. p. 36). Wood appeared deeply troubled by the rape and described it as "pretty ugly." (R. p. 36). The trial court asked if Wood could be a fair and impartial juror on the case and Wood responded, "I don't think so." (R. p. 36). Upon further questioning and after a long pause, Wood again replied, "I don't think so," to the question "And it would *not* interfere with your ability to be fair to the State and the Defendant?" The trial court refused to dismiss Juror Wood for cause. The court, however, struck Jurors 9, 29, 30, 43, and 55 based upon a similar colloquy, but for matters that did not rise to the level of a "pretty ugly" rape for which the perpetrators had "got away with it." (R. pp. 37-39).

Subsequently, Juror Wood, No. 98, was presented as a potential juror, at which time Petitioner moved to strike Juror Wood for cause. (R. p. 40). However, the trial court

denied the motion and the Petitioner was forced to use a peremptory challenge to dismiss Wood. (R. p. 40). As a result, Petitioner used all of his peremptory challenges prior to the last juror being selected. (R. p. 41). That juror was juror No. 40, Thomas Horne, whom the court appointed as the foreperson and a juror the Petitioner would have dismissed had he had a peremptory strike remaining. (R. p. 43).

The Sixth Amendment provides, "[i]n all criminal prosecutions, the accused shall enjoy the right to a ... public trial, by an impartial jury." U.S. Const. amend. VI. The constitutional standard of fairness mandates that a criminal defendant have a panel of impartial, indifferent jurors. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). In the ultimate analysis, only the jury can strip a person of his liberty, and a juror must be as indifferent as he or she stands unsworn and render a verdict based upon the evidence developed at trial. *Irvin v. Dowd*, 366 U.S. 717 (1961).

A juror is biased and should be excused if his or her personal views would prevent or substantially impair the performance of his or her duties as a juror in accordance with the instructions and oath. *Wainwright v. Witt*, 469 U.S. 412 (1985). Although *Wainwright* was a capital murder case, the rule applies no matter the charges or punishment a defendant is facing. *See, e.g., U.S. v. Scull*, 321 F.3d 1270 (10th Cir. 2003) (rule applied in a drug case); *U.S. v. Jackson*, 204 F.3d 1118 (5th Cir. 1999) (rule applied in a rape case); *U.S. v. Scott*, 159 F.3d 916 (5th Cir. 1998) (rule applied in case involving wire fraud and other financial crimes). A juror's response must be examined in light of the entire colloquy and not simply the answer to a

single question. *State v. Matthews*, 291 S.C. 339, S.E.2d 444 (1986).

In South Carolina, an appellate court reviewing an alleged error as to the qualification of a juror engages in a three-step analysis. *State v. Council,* 335 S.C. 1, 515 S.E.2d 508 (1999); *Green v. Maynard*, 349 S.C. 535, 564 S.E.2d 83 (2002), *cert. denied*, 536 U.S. 980 (2002). First, appellant must show that he exhausted all of his peremptory challenges. Second, if all peremptory challenges were used, the court must determine if the juror was erroneously qualified. Third, appellant must demonstrate this error deprived him of a fair trial. *State v. Council.*

In this case, Juror No. 98 clearly stated that because of his familiarity with his sister-in-law's rape, he could not be fair and impartial in the case. When pressed, Juror No. 98 gave unclear responses and, in the context of the trial court's entire examination, made it clear he could not be unbiased. The juror first stated that he could ***not*** be fair and impartial in this case, and did not refute that answer in any of his subsequent responses. Although the trial court rephrased the question by asking **"and it would not interfere with your ability to be fair to the State and the Defendant?"** the juror replied **"I don't think so."** Reading the question and answer in the context of each other, the juror essentially said, **"I don't think it would *not* interfere with my ability to be fair to the State and the Defendant,"** or, in other words, **"I think it *would* interfere with my ability to be fair."** Hence, the juror, on both occasions said that he could not be fair and impartial and he never gave any other answer to the questions.

Petitioner had to use a peremptory challenge to keep Juror No. 98 from being seated, and Petitioner subsequently exhausted his peremptory challenges resulting in the seating of Juror No. 40, whom Petitioner would have struck and whom the trial court appointed as foreman of the jury. This deprived Petitioner of his Constitutionally guaranteed protection of Due Process of Law.

Accordingly, this Court should grant this Petition, issue a Writ of Certiorari to the South Carolina Court of Appeals, review the decision in *State v. Nicholson*, reverse Petitioner's conviction where Petitioner was deprived of a fair trial by the trial court's refusal to disqualify Juror No. 98, and remand the matter for further proceedings consistent with this Court's ruling.

II. The Trial Court's Refusal to Suppress the Testimony of the State's Expert Witness and Denial of a Continuance Under the Facts and Circumstances of this Case, Deprived Petitioner of Due Process of Law as Guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution

On February 14, 2002, Petitioner served a Request for Disclosure upon the State, seeking among other things "[t]he names, addresses and phone numbers of all witnesses which the Prosecution intends to call at the trial of the case." (R. p. 30, ¶ 4). The request was to continue until the time of trial. (R. p. 31).

On Monday, October 14, 2002, one (1) week prior to the start of trial, the State served a notice upon the Petitioner that it planned to call "Master Social Worker" Lynn Finley as an expert witness in the general characteristics and/or

dynamics of an alleged sexual abuse victim. (R. p. 33). The notice arrived at defense counsel's office in Walhalla, South Carolina, on that Monday when counsel was in Columbia, South Carolina, appearing before the South Carolina Court of Appeals in another cause.

Upon returning to his office after normal working hours, defense counsel found the State's notice awaiting him. This left only four (4) working days in which to find an expert to assist the defense in preparing for those matters to be addressed by Ms. Finley, to advise the defense in regards to the same, and/or to offer advice and adequately assist in preparing defense counsel for an effective cross-examination of Ms. Finley. Due to defense counsel's workload, other scheduled cases, and trial preparation in the case *sub judice*, defense counsel was without reasonable time to effectively and adequately deal with the proposed expert testimony that, until that point in time, had not been an issue nor even contemplated in the case.

On October 16, 2002, counsel moved the trial court to suppress Ms. Finley's testimony or, in the alternative, to continue the matter to permit Petitioner an opportunity to adequately prepare for Ms. Finley's testimony, and to obtain his own expert to assist him in preparing cross-examination and/or to respond to Ms. Finley's testimony. (R. pp. 25-26). The trial court denied the motion, and permitted Ms. Finley to testify. (R. pp. 62-68, 179).

A fair trial in a fair tribunal is a basic requirement of Due Process. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). *Accord Estelle v. Williams*, 425 U.S. 501 (1976) (the right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment). In this matter, Petitioner was

denied a fair trial by the State's failure to timely disclose its intent to present Ms. Finley's expert testimony (1) that it is common for child sex abuse victims to cooperate with their abusers; (2) that it is common for those victims not to immediately report the abuse; and (3) that it is common for those victims to exhibit behavioral problems. The State disclosed this witness essentially on the eve of trial, thereby depriving defense counsel of the ability to adequately prepare for cross-examination of Ms. Finley, or to locate and marshal expert evidence to rebut her testimony. Petitioner sought a continuance so as to take steps to address this late-named expert, but the trial court simply refused.

The disclosure requirements found in *Brady v. Maryland*, 373 U.S. 83 (1963) are grounded in the notion that a criminal defendant is deprived of a fair trial if not given access to favorable evidence that is material to guilt or punishment. Although the testimony offered by Ms. Finley was not of itself exculpatory or favorable to Petitioner, the fact that the State waited until the eve of trial, and the trial court's subsequent refusal to permit a continuance under the circumstances of this case, deprived Petitioner of a fair opportunity to defend against this evidence. *Compare Chambers v. Mississippi*, 410 U.S. 284 (1973) (the right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations).

Accordingly, this Court should grant this Petition, issue a Writ of Certiorari to the South Carolina Court of Appeals, review the decision in *State v. Nicholson*, reverse the rulings permitting the State to present the late-disclosed expert witness testimony and the trial court's

denial of a continuance, and remand the matter for further proceedings consistent with this Court's ruling.

III. The Trial Court Impermissibly Became an Advocate for the State by Instructing the Solicitor as to How to Properly Lay a Foundation for Crucial Audiotape Evidence Under the Facts and Circumstances of this Case, and Deprived Petitioner of Due Process of Law as Guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution

During the trial, the Solicitor attempted to introduce into evidence a composite audio-tape recording of conversations between the alleged victim and the Petitioner. (R. pp. 142-143). The recording consisted of excerpts of two (2) separate conversations that occurred on December 20 and 27, 2001. The Solicitor, however, failed to establish a foundation for admission of the tape. The Solicitor apparently was unaware of the requirements for introducing a composite recording into evidence.

Instead of simply sustaining Petitioner's objection to the introduction of the tape recording into evidence, the trial court specifically advised and instructed the Solicitor on how to establish a proper foundation for the tape's introduction into evidence, and then ordered a recess to enable the Solicitor to take the steps necessary, as outlined in detail by the trial court, to have the tape admitted into evidence. (R. pp. 144-154). This included the trial court's providing the Solicitor with an excerpt from an evidence book on how to authenticate evidence. (R. p. 155). The trial court overruled Petitioner's objection to the court's conduct and, following the recess, the Solicitor, acting in accordance with the trial court's advice and instructions,

succeeded in laying a sufficient foundation for the trial court to admit the composite tape. (R. pp. 155-159).

As it turned out, the tape was the critical piece of evidence without which Petitioner would not have been convicted. This is clearly evidenced by the Solicitor's closing argument expressly recognizing the tape's importance and telling the jury that the tapes were the only thing that proved the State's case. (R. pp. 300-305). It is further supported by the fact that during its deliberations and before reaching its verdict the jury requested and was allowed to listen to the tape once again. (R. pp. 320, 323-326).

Trial judges should use restraint and not interject themselves into a role in a trial which may be perceived as that of an advocate rather than an impartial arbiter. *State v. Riels*, 216 S.W.3d 737 (Tenn. 2007). A fair trial by an impartial judge is an essential element in Due Process. *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *Owens v. State*, 750 N.E.2d 403 (Ind. App. 2001). A trial judge should never assume the role of the prosecution and lend the weight of his or her great influence to the side of the government. *Hunter v. U.S.*, 62 F.2d 217 (5th Cir. 1932); *Asbury v. State*, 765 So.2d 965 (Fla.Dist.Ct.App. 2000).

In this case, the Solicitor simply did not lay a proper foundation for the admission of the audiotape until the trial court became actively involved and instructed her in detail how to accomplish admission of the tape. The trial court abandoned its role as neutral arbiter and assumed a role of assisting the Solicitor and advising her how to admit this critical piece of evidence against Petitioner. The court crossed the line and "entered the fray" by advising the Solicitor as to what she needed to do, telling her the

questions to ask so as to lay an acceptable foundation for the tape recordings, and granting a recess to give her time to comply with the court's advice. The query from the jury, as well as the focus of the Solicitor's closing argument on the recordings, demonstrates this evidence was vital to the ultimate conviction of Petitioner.

Accordingly, this Court should grant this Petition, issue a Writ of Certiorari to the South Carolina Court of Appeals, review the decision in *State v. Nicholson*, reverse the conviction based upon the actions of the trial court in becoming an advocate for the State, and remand the matter for further proceedings consistent with this Court's ruling.

IV. The Trial Court's Limitation of Petitioner's Cross-examination of the Alleged Victim Deprived Petitioner of Due Process of Law as Guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, as Well as His Right to Confront Witnesses Against Him as Provided by the Sixth and Fourteenth Amendments

Petitioner remained silent at trial and did not testify. His defense was not that the acts did not occur but, rather, that they occurred in 1996 when the alleged victim was sixteen (16) years of age (the age of consent in South Carolina). The record disclosed that the alleged victim was a troubled child from a young age, that his parents divorced when he was five (5) years old, that he had previously been sexually abused by a female babysitter who had performed an act of fellatio upon him when he was five (5) years old, and that he had major problems with not only his father, but also with his step-father and his mother.

The record revealed that the alleged victim grew up in a very dysfunctional family; however, the trial judge would not allow the defense counsel to fully explore or present to the jury the prior sexual abuse in any way in Petitioner's defense.

Prior to trial, Petitioner made a motion pursuant to Rule 5, SCRCrimP, and *Brady v. Maryland*, 373 U.S. 83 (1963), specifically requesting any and all psychological assessments or information of any witnesses that the State intended to introduce against Petitioner. (R. p. 30, ¶ 5). However, the State did not furnish Petitioner with any psychological information of the alleged victim, nor was Petitioner advised that any existed. (R. p. 66). Approximately one (1) week prior to trial, Petitioner's counsel examined records of the Family Court and discovered that the alleged victim had been previously evaluated and received psychological counseling from Dr. Kinley Sturkie and Dr. Paul Wood. Counsel subpoenaed the records from Dr. Wood and Dr. Sturkie, as well as attorney William Derrick, who had represented the alleged victim's mother in a Family Court matter in which the records were obtained and used. Dr. Wood, Dr. Sturkie and Mr. Derrick, however, were reluctant to release the records to the Petitioner's counsel without a Court Order.

Petitioner advised the trial court of the existence of the records and the reluctance of Dr. Wood, Dr. Sturkie and Mr. Derrick to release the records. (R. pp. 71-73). In response to Petitioner's counsel's request, the trial court ordered that the records be sealed and delivered to the court for an "*in camera*" review to determine whether there was anything in the records that was discoverable by the Petitioner and relevant to the defense in this case. (R. pp. 73-74). Although details of the files were not disclosed

to the defense, there was independent information in unsealed Family Court records stating or suggesting that the files contained detailed information and psychological evaluations of the alleged victim, information concerning the prior incident of fellatio performed by the female babysitter when the alleged victim was five (5) years old, and other information concerning the dysfunctional and troubled family life of the alleged victim. The records were not submitted to the court, however, until after the trial had begun and, over Petitioner's objections, the trial court did not review the records *in camera* in the presence of the attorneys until October 24, 2002, the last day of the trial (after the State's expert had testified). (R. pp. 73-76, 239-250). After reviewing the records, the trial court refused to allow Petitioner's counsel to personally review the files to determine what counsel may have believed was useful in the defense. The court permitted counsel access to some very limited information but restricted Petitioner's counsel's interrogation of the alleged victim and other family members concerning the same.

Specifically released was a questionnaire the alleged victim filled out when he was fourteen (14) years of age, an affidavit of the alleged victim that had been filed in the Family Court action disclosing his relationship with his natural father, and an affidavit of the alleged victim's mother, Ms. Teresa Lemere, concerning her son's propensity to excuse himself from the responsibility and/or the consequences of his actions. (R. p. 382; App. 87-94).

Since the alleged victim had already testified on direct, the trial judge permitted defense counsel to recall the alleged victim to the stand for the limited purpose of asking him about his affidavit and the questionnaire. The judge did not permit counsel to go any further or delve into

the alleged victim's dysfunctional family life in any way, or present to the jury or talk about the prior act of fellatio and/or the alleged victim's sexual activity and the effects that the prior fellatio may have had upon him.

At the time of the ruling, Ms. Lemere had not testified. After the trial reconvened, the State called her as a witness and defense counsel was allowed to cross-examine her on those same matters but, again, the trial court restricted defense counsel as to the depth into which counsel could delve into the dysfunctional family problems and the alleged victim's past history and did not permit counsel to ask about the prior fellatio incident.

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. *Clark v. Arizona*, 126 S.Ct. 2709 (2006); *Holmes v. South Carolina*, 547 U.S. 319 (2006). The right to confront one's accusers is a concept that dates back to Roman times. *Crawford v. Washington*, 541 U.S. 36 (2004).

Petitioner did not seek to attack the alleged victim's morality or character by exploring the prior event. Instead, Petitioner sought to explore the doorway opened by the State through its opening statement and presentation of the testimony of the expert as well as that of the alleged victim. It is fundamentally unfair to permit the State to present evidence that the alleged victim displayed the characteristics of a victim of child sexual abuse, and then prevent Petitioner from offering evidence from which the jury could have found those characteristics were related to abuse the alleged victim suffered at age five (5) at the

hands of another person. The rulings also prevented Petitioner from having a fair opportunity to develop whether the alleged victim transferred his hostility to Petitioner for acts that were unrelated to Petitioner, and to further establish that the alleged victim was, in fact, of the age of consent when the acts for which Petitioner was on trial occurred.

The trial court's limitation of access to the alleged victim's records, as well as the limitation on Petitioner's cross-examination of the alleged victim, particularly after the State opened the door by the presentation of the expert evidence on behavioral characteristics of the victims of abuse, denied Petitioner of Due Process and violated his Constitutionally protected rights under the Confrontation Clause. Accordingly, this Court should grant this Petition, issue a Writ of Certiorari to the South Carolina Court of Appeals, review the decision in *State v. Nicholson*, reverse the conviction based upon the actions of the trial court in limiting Petitioner's ability to fully cross-examine his accuser and challenge the expert evidence presented by the State, and remand the matter for further proceedings consistent with this Court's ruling.

CONCLUSION

This Court should review the decision of the South Carolina Court of Appeals by way of a writ of certiorari and find that Petitioner was deprived of his Constitutional protections under the Due Process and Confrontation Clauses of the United States Constitution, thereby depriving him of a fair trial. The Court should reverse

Petitioner's convictions and remand the matter for further proceedings consistent with this Court's rulings.

Respectfully submitted,

JOHN S. NICHOLS
BLUESTEIN & NICHOLS, LLC
Attorney for Petitioner
William Max Nicholson

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

William Max Nicholson, Appellant.

Appeal From Oconee County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 4011
Heard June 7, 2005 – Filed July 5, 2005

AFFIRMED

Larry C. Brandt, of Walhalla, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General W. Rutledge Martin, all of Columbia; and Solicitor Christina T. Adams, of Anderson, for Respondent.

GOOLSBY, J.: William Max Nicholson appeals his convictions for three counts of second-degree criminal sexual conduct. We affirm.

FACTS

The trial in this case revolved around the accusations of a young adult male who was born March 25, 1980. In

late 2001, he told his mother that Nicholson sexually assaulted him several years earlier.

On December 21, 2001, the accuser gave a written statement about the alleged assaults to the Oconee County Sheriff's Department. According to the statement, the accuser first met Nicholson, a high school science teacher, when he was a ninth-grade student in Nicholson's physical science class at West Oak High School. The accuser participated in tasks such as setting up labs and cleaning up chemical spills. Eventually, he began to receive small sums of money from Nicholson for this work. At that time, the accuser was not approached in a sexual manner.

After the school year ended, the accuser, at Nicholson's request, began doing odd jobs around Nicholson's house and receiving payment from Nicholson for his services. Although the accuser could not remember exactly how Nicholson approached him, he related that the "incidents" began only after "a few times of doing the work" and that they were "in the nature of oral sex" performed by Nicholson on him.

The following school year, the accuser was initially enrolled at Walhalla High School, but later transferred back to West Oak High School. After he transferred back to West Oak, he visited Nicholson's classroom frequently even though he did not have Nicholson for class. During the summer, the accuser helped Nicholson move to another residence. Although the move was completed before the end of the summer, Nicholson offered the accuser additional work, promising the pay would be fair and a bonus was possible. Throughout the completion of those tasks, the oral sex continued, probably at least every other day, for the duration of the summer. When the accuser reached

eleventh grade, he continued his relationship with Nicholson and claimed that he received at least a thousand dollars per month for his companionship. The incidents became less frequent when the accuser reached twelfth grade, and he surmised this was because he was approaching adulthood and Nicholson's "fascination was strictly adolescent males." Even so, the accuser claimed that he visited Nicholson at various times in the month preceding the investigation and that Nicholson paid him a total of about one thousand dollars during that time.

As part of the investigation, law enforcement officers outfitted the accuser with a recording device and sent him to Nicholson's home on two occasions for the express purpose of eliciting incriminating statements from Nicholson. They also videotaped Nicholson's home while Nicholson and his accuser were inside talking and filmed the accuser on the porch talking with Nicholson as the accuser was preparing to leave the premises. Although Nicholson made no direct admissions on the tape, he did not refute statements by the accuser.

Authorities arrested Nicholson on January 2, 2002. After a preliminary hearing on February 22, 2002, and February 26, 2002, the Oconee County Grand Jury issued three indictments against Nicholson for second-degree criminal sexual conduct, charging him with committing acts of fellatio on his accuser during the periods of June 1 through June 30, 1995; July 1 through July 31, 1995; and August 1 through August 18, 1995.

After a jury trial commencing October 21, 2002, Nicholson was convicted on all three indictments and sentenced to twelve years. After the trial judge denied his post-trial motions, Nicholson filed this appeal.

LAW/ANALYSIS

1. Nicholson argues the trial judge should have dismissed the indictments because the time periods alleged were not sufficiently specific. In particular, he complains that without more specific dates in the indictments, he could not avail himself of the defense of alibi and other testimony that could have refuted his accuser's claims or impeached his accuser's credibility. We reject these arguments.

"Where time is not an essential element of the offense, the indictment need not specifically charge the precise time the offense allegedly occurred."[1] "[T]he sufficiency of an indictment must be judged from a practical standpoint, with all of the circumstances of the particular case in mind."[2]

In this case, time was not an essential element of the charged offenses.[3] Moreover, although Nicholson argued in his brief that the trial judge should have, in the alternative, required the State to make the dates of the offenses

---

[1] *State v. Wingo,* 304 S.C. 173, 175, 403 S.E.2d 322, 323 (Ct. App. 1991).

[2] *State v. Wade,* 306 S.C. 79, 83, 409 S.E.2d 780, 782 (1991) (citing *State v. Adams,* 277 S.C. 115, 125, 283 S.E.2d 582, 588 (1981)).

[3] *Cf. State v. Thompson,* 305 S.C. 496, 501, 409 S.E.2d 420, 423 (1991) ("The specific date and time is not an element of the offense of first degree criminal sexual conduct."); 65 Am. Jur. 2d *Rape* § 34, at 582 (2001) ("Because time is not an essential ingredient of either forcible or statutory rape, the exact date of the commission of the offense need not be alleged unless a statute provides otherwise."); 75 C.J.S. *Rape* § 45, at 515-16 (1952) (stating it is proper and sufficient to prove the commission of a sexual assault on any day before the indictment and within the period of limitations and, in cases involving a victim under the age of consent, on a day when the victim was still under the statutory age).

more definite and certain, we do not see any indication in the record that this issue was clearly raised at trial.[4]

2. We disagree with Nicholson's argument that the trial judge erred in denying his directed verdict motion.

Under Rule 19(a) of the South Carolina Rules of Criminal Procedure, "the court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of *competent* evidence tending to prove the charge in the indictment."[5] In considering a directed verdict motion, the court "shall consider only the existence or non-existence of the evidence and not its weight."[6] "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury."[7]

At the close of the testimony, Nicholson moved for a directed verdict on the ground that there was "no credible evidence as to all the elements upon which the burden of proof lies upon the State." On appeal, he alleges there were inconsistencies and time gaps in the accuser's testimony and suggests, among other things, that the evidence supported a finding that the alleged abuse occurred after the accuser's sixteenth birthday and was therefore outside

---

[4] *See State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 913 (2004) (stating that an issue must be "raised to the trial court with sufficient specificity" to be preserved for appellate review) (citing Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002)).

[5] Rule 19(a), SCRCrimP (emphasis added).

[6] *Id.*

[7] *State v. Cherry*, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004).

the statutory age limit for the offense with which he was charged.[8] We agree with the trial judge, however, that, viewing the evidence in the light most favorable to the State, Nicholson was not entitled to a directed verdict.

The accuser testified Nicholson performed oral sex on him "throughout the summer" of 1995. Specifically, he averred the oral sex happened in June, July, and August of 1995, and at a frequency of two to three times per week. There was no dispute that the accuser's date of birth was March 25, 1980, which would have made him under the age of sixteen during the summer of 1995. It further appears uncontested that he was younger than Nicholson and had been a student in Nicholson's class, which would have placed Nicholson in a "position of familial, custodial, or official authority to coerce the victim to submit."[9] Any concerns about contradictory statements by the accuser, whether on the stand or outside the courtroom setting, were ultimately about his credibility and therefore in the domain of the jury.[10]

---

[8] Nicholson was charged under South Carolina Code section 16-3-655(3), which requires that the victim be at least fourteen years of age but less than sixteen years of age. S.C. Code Ann. § 16-3-655 (2003).

[9] *Id.*

[10] *See State v. Buckman,* 347 S.C. 316, 324 n.6, 55 S.E.2d 402, 406 n.6 (2001) (mentioning whether a witness was credible goes to the weight of the evidence and is therefore not considered by the trial court when it considers a directed verdict motion); *State v. Copeland,* 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982) (allowing testimony of prior inconsistent statements to be used as "substantive evidence when the declarant testifies at trial and is subject to cross examination"); *State v. Crawford,* 362 S.C. 627, 634, 608 S.E.2d 886, 890 (Ct. App. 2005) (noting that a contradiction between a witness's "sworn statement to police and his later testimony in court is a matter of weight for the jury to decide").

3. Nicholson also contends he was deprived of a fair trial because the presiding trial judge instructed the solicitor on how to introduce a piece of evidence against him. We disagree.

During the trial, the solicitor sought to introduce into evidence a composite audiotape recording of conversations between Nicholson and his accuser that took place on December 20 and 27, 2001. While the solicitor was attempting to lay a foundation for admission of the recording, the trial judge, apparently dissatisfied with the solicitor's line of questioning, undertook to advise her outside the presence of the jury about the particulars that he viewed as necessary steps in this procedure. Nicholson objected to the "depth and detail" of the assistance to the State. After a recess, the solicitor, following the trial judge's advice, made a successful proffer of the tape.

We find no error in the trial judge's intervention in this case. In *State v. Gaskins,* the supreme court, quoting *State v. Anderson,* reiterated the following "duties and limitations" that a trial judge must observe while conducting a trial:

> A grave responsibility rests upon a trial judge. It is his duty to see to it that justice be done in every case, if it can be done according to law; and, *if he thinks that the attorney for either party, either from inadvertence or any other cause, has failed to ask the witnesses the questions necessary and proper to bring out all the testimony which tends to ascertain the truth of the matter under investigation, we can see no legal objection to his propounding such questions*; but, of course, he should do so in a fair and impartial manner, and should not by the form or manner of his questions express or indicate to the *jury* his opinion

> as to the facts of the case, or as to the weight or sufficiency of the evidence.[11]

In our view, the trial judge did not exceed the limits recognized in *Gaskins*. The jury was absent from the courtroom when the exchange at issue took place and thus could not have been affected by the trial judge's remarks. Moreover, the trial judge, when explaining to counsel what he required to lay a foundation, did not show any favoritism or otherwise indicate he had an opinion about the case. We therefore hold that, contrary to Nicholson's argument, the instructions did not result in the trial judge's assumption of an adversarial role in the case.[12]

4. Nicholson next argues the trial judge erred in refusing to strike a juror for cause. We disagree.

In the voir dire, the trial judge asked if any members of the jury panel or their close personal friends or family members had been victims or claimed to be victims of any type of sexual offense or child abuse. Among those answering the question in the affirmative was Juror Number 98,

---

[11] *State v. Gaskins*, 284 S.C. 105, 119, 326 S.E.2d 132, 140-41 (1985) (quoting *State v. Anderson*, 85 S.C. 229, 233, 67 S.E. 237, 238 (1910)), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (emphases added).

[12] *See People v. Robinson*, 603 N.E.2d 25, 29 (Ill. App. Ct. 1992) ("A trial judge may remind the prosecutor of the necessity to prove additional elements, examine witnesses to clarify material issues or eliminate confusion, and advise counsel on the proper phrasing of questions."); *Village of Lodi v. McMasters*, 511 N.E.2d 123, 124 (Ohio Ct. App. 1986) ("During the trial, a judge may, in the interest of justice, act impartially in developing facts germane to an issue of fact to be determined by the jury."); 23A C.J.S. *Criminal Law* § 1180, at 51 (1989) (noting the trial judge "is the governor of the trial" and it is therefore "his duty[ ] to participate directly in the trial and to facilitate its orderly progress[ ] and insure that the issues are clearly presented to the jury").

who advised the trial judge that his sister-in-law had been raped and the perpetrators "got away with it" and "[i]t was pretty ugly." Notwithstanding this information, Juror Number 98 was not dismissed for cause. Nicholson argues on appeal that, during jury selection, he was forced to use one of his peremptory challenges to excuse this particular juror, which ultimately resulted in the seating of another juror whom he maintains he would have excused but for the exhaustion of all his peremptory strikes.

Nicholson's argument before the trial judge and on appeal focuses on the juror's apparently "deeply troubled" demeanor and answer to a follow-up question from the trial judge that suggested that he could not be fair and impartial. In the colloquy, it is evident that, when initially examining the juror, the trial judge asked two questions in immediate succession. Whereas the first question called for a negative response from a qualified juror, the second question called for an affirmative answer. To clear up the confusion, the trial judge impressed upon the juror the importance of a fair trial for both sides, inquiring of him, "Could you do that?" The juror responded affirmatively. The trial judge also rephrased the other question, asking the juror, "And it would not interfere with your ability to be fair to the State and the defendant?" To this question the juror replied, "I don't think so." Based on these exchanges, we hold the trial judge conducted an adequate examination into the juror's impartiality and acted within his discretion in qualifying Juror Number 98.[13]

---

[13] *See State v. George*, 323 S.C. 496, 503, 476 S.E.2d 903, 907 (1995) ("A venireperson must be excused only if her opinions would prevent or substantially impair the performance of her duties as a juror in accordance with her oath and instructions."); *State v. Tucker*, 320 S.C.

(Continued on following page)

5. During closing argument, the solicitor referred to Nicholson's counsel as an "experienced defense attorney," which, Nicholson contends, may have suggested to the jury he was guilty because he hired experienced counsel. The solicitor also made references about "justice for all" and advised the jurors that, in reaching a verdict, they could consider the trauma of the trial on Nicholson's accuser. Nicholson asserts the trial judge erred in denying his motion for a mistrial based on these allegedly improper comments. We find no abuse of discretion.[14] Nicholson failed to make a contemporaneous objection to either remark,[15] and, although the trial judge declined to declare a mistrial, he issued a curative instruction.[16]

6. We reject Nicholson's argument that the trial judge erred in refusing to grant his motion to suppress the

---

206, 211, 464 S.E.2d 105, 108 (1995) ("The determination whether a juror is disqualified is within the discretion of the trial judge and will not be reversed on appeal unless wholly unsupported by the evidence."); *id.* ("[I]n reviewing the trial judge's disqualification of prospective jurors, the responses of a challenged juror must be examined in light of the entire voir dire.").

[14] *See State v. Copeland,* 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) ("The trial court has broad discretion when dealing with the propriety of the solicitor's argument, including the question of whether to grant a defendant's mistrial motion.").

[15] *See In re McCracken,* 346 S.C. 87, 93, 551 S.E.2d 235, 238-39 (2001) (stating a contemporaneous objection is required to preserve issues regarding a closing argument for review); *State v. Moultrie,* 316 S.C. 547, 555-56, 451 S.E.2d 34, 39 (Ct. App. 1994) (holding the lack of a contemporaneous objection could not be salvaged by a motion for a mistrial).

[16] *See State v. Cooper,* 334 S.C. 540, 554, 514 S.E.2d 584, 591 (1999) (deeming the solicitor's impermissible closing remarks about the defendant's failure to present a case cured by the trial court's instructions).

testimony of an expert witness offered by the State or, in the alternative, to grant a continuance so he could obtain his own expert on the subject. The witness was called to testify about the general characteristics of a sex abuse victim. Nicholson contends the notice he received from the State about this witness was too close in time to the trial for him to prepare his defense. The State, however, is, not required to provide its witness list to a criminal defendant,[17] and the disclosure in the present case of this witness to the defense before trial was nothing more than a professional courtesy. We therefore hold that the trial judge properly declined to suppress the expert testimony and acted within his discretion in refusing to continue the case.[18]

7. Next, Nicholson asserts the trial judge should have required the State to release records concerning two psychological evaluations that had been performed on his accuser during a family court proceeding between the accuser's parents. Nicholson further alleges the trial judge erred in limiting cross-examination of the accuser about his mental health history and in denying the defense "sufficient time and opportunity to effectively process certain information." We find no error.

---

[17] *See Brady v. Maryland*, 373 U.S. 83 (1963) (requiring the State to divulge to a criminal defendant exculpatory or mitigating information); Rule 5, SCRCrimP (requiring the State to disclose certain statements of the defendant, the defendant's prior record, certain documents and tangible objects, and certain reports of examinations or tests).

[18] *See State v. McMillian*, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) ("A trial judge's denial of a motion for continuance will not be disturbed absent a clear abuse of discretion.").

The records that Nicholson sought were not in the State's possession; and the trial judge did not allow full access of the documents to either the State or to the defense. After receiving the records under seal and reviewing them for admissibility, the trial judge "declined to admit it based on the confidential nature of the report" and further noted that any probative value in the records would be outweighed by the fact that they were "remote" and "somewhat cumulative." We hold the trial judge followed the correct procedure in determining whether Nicholson could have access to his accuser's psychological evaluations and whether the evaluations were admissible.[19] Moreover, we have reviewed the records, which were submitted to this court under seal, and concur with the trial judge that the evaluations were so remote in time they would render questionable any probative information they might yield in the present case.

8. Nicholson asserts recordings by law enforcement of the conversations between him and his accuser should

---

[19] *See* S.C. Code Ann. § 16-3-659.1(1) (2003) (providing that evidence of specific incidents of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct are not admissible in prosecutions for criminal sexual conduct; *id.* § 19-11-95(D)(1) (Supp. 2004) (stating a mental health provider shall reveal confidences "when required . . . by court order for good cause shown to the extent that the patient's care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding); *id.* § 44-115-40 (2002) (prohibiting a physician from releasing medical records without the written consent of the patient); *State v. Bryant,* 307 S.C. 458, 461, 415 S.E.2d 806, 808 (1992) (noting the State is required to disclose evidence in its *possession* favorable to the accused and material to guilt or punishment and stating that the trial court must inspect contested material to determine if it should be available to a defendant under a *Brady* request).

have been suppressed because they amounted to a denial of his right to counsel, an invasion of his privacy, and an unreasonable search and seizure. We disagree. When the tapes were made, Nicholson was not in police custody and had not been indicted.[20] In addition, there was no dispute that the accuser in this case consented to have his conversations with Nicholson recorded.[21]

9. Finally, Nicholson contends the cumulative effect of the errors he has alleged warrants a new trial.[22] Because, however, we have determined that the trial judge did not err in any of the particulars alleged in this appeal, we likewise hold the cumulative error doctrine is inapplicable.

AFFIRMED.

HUFF and KITTREDGE, JJ., concur.

---

[20] *See State v. Owens,* 346 S.C. 637, 661, 552 S.E.2d 745, 758 (2001) ("The Sixth Amendment right to counsel attaches when adversarial judicial proceedings have been initiated and at all critical stages."), *overruled on other grounds by State v. Gentry,* 346 S.C. 637, 552 S.E.2d 745 (2005); *State v. Sprouse,* 325 S.C. 275, 282, 478 S.E.2d 871, 875 (Ct. App. 1996) (stating the focus of an investigation on a suspect who is not in custody does not trigger *Miranda* warnings).

[21] *State v. Andrews,* 324 S.C. 516, 519-21, 479 S.E.2d 808, 810-11 (Ct. App. 1996) (holding a tape of a telephone call was admissible because one party to the call consented to the recording).

[22] *See State v. Johnson,* 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (noting the cumulative error doctrine provides relief when a combination of errors, each of which may be considered insignificant by itself, has the collective effect of preventing a party from receiving a fair trial).

STATE OF SOUTH CAROLINA	)	
	:	IN THE COURT OF
	:	GENERAL SESSIONS
COUNTY OF OCONEE	)	
THE STATE OF SOUTH CAROLINA,	)	SUPPLEMENTAL ANSWER TO DEFENDANT'S REQUEST FOR
VS.	)	FAVORABLE EVIDENCE AND REQUEST FOR DISCOVERY AND INSPECTION
WILLIAM MAX NICHOLSON,	)	2002-GS-37-0236 2002-GS-37-0237 2002-GS-37-0238
DEFENDANT.	)	

(Filed Oct. 7, 2002)

TO: LARRY C. BRANDT,
ATTORNEY FOR DEFENDANT:

The State would answer the Defendant's Request for Favorable Evidence and Request for Discovery and Inspection as follows:

1. Lynn Finley is a 1979 graduate of Indiana University with a Masters Degree in Social Work. She has been licensed Master Social Worker since 1989, a licensed Professional Counselor since 1986, and a licensed Supervisor for Professional Counselors since 1997. She is presently employed as the Clinical Coordinator at Anderson County Department of Social Services and Child Protective Services. She has practiced therapy in various private and government agencies specializing in children and families for 22 years. Lynn Finley will testify that it is common

for child sexual abuse victims to cooperate with their abusers. She will also testify that it is common for child sexual abuse victims not to immediately report the sexual abuse. She will further testify that it is common for child sexual abuse victims to exhibit behavioral problems.

/s/ Druanne D. White
DRUANNE D. WHITE, SOLICITOR
Tenth Judicial Circuit

Walhalla, South Carolina
Dated:

STATE OF SOUTH CAROLINA) COUNTY OF GREENVILLE)) STATE OF SOUTH CAROLINA) Plaintiff,) -VS-) William Max Nicholson) Defendant.)	IN THE COURT OF GENERAL SESSIONS Case No(s).: 02-GS-37-236-238 TRANSCRIPT OF RECORD

October 21, 2002
Walhalla, South Carolina

BEFORE:

HONORABLE ALEXANDER S. MACAULAY, Judge.

APPEARANCES:

DRUANNE WHITE, Esquire
Assistant Solicitor

LARRY BRANDT, Esquire
Attorney for Defendant

TERESA B. JOHNSON
OFFICIAL REPORTER

* * *

[17] your ability to give both the State and defendant a fair and impartial trial in this case?

POTENTIAL JUROR: No, sir.

THE COURT: All right. Thank you, sir. Any one else?

JURY PANEL: (No response).

THE COURT: All right. I have four questions here that I am going to ask collectively. In other words, I'm going through then in fact as I did before in the general qualifications, I'll go through all four questions twice. I do not want you to respond if you think the questions might apply to you or you have a question about the questions themselves until I ask you to do so after I have gone through all four questions twice.

Is there any member of the jury panel or a close personal friend or family member ever been accused of or charged with any type of sexual offense or child abuse? Is there any member of the jury panel or a close personal friend or family member related to the attorneys in this case which includes the Solicitor Ms. Druanne White or the defense attorney Mr. Larry Brandt or in any way be it been employed or had a professional relationship to employment with the Solicitor's office or the defense attorney Mr. Brandt [18] in this case? If so, please stand. Excuse me. Not at this time.

Is any member of the jury panel a close personal friend or family member ever been a victim or claimed to be a victim of any type of sexual offense or child abuse? Is any member of the jury panel a close personal friend or family ever been taught – I think I asked that by the defendant?

I'm going through the questions again. And do not respond until I ask you to do so at the end. Is any member of the jury panel a close or personal friend or family ever been accused of or charged with any type of sexual offense or child abuse? Is there any member of the jury panel who is a close personal friend or family member related to the attorneys in this case or has a personal or professional

relationship to include employment with the Solicitor or the defense attorney in this case? Solicitor White or Defense Attorney Mr. Brandt.

Is there any member of the jury panel or a close personal friend or family member ever been a victim of or claimed to be a victim of any type of sexual offense or child abuse? If so, please stand at this time. And I will ask you to come forward individually. (WHEREFORE, individual voir dire was held of the [19] following jurors: Charles D. Wood, Juror number 98.)

THE COURT: Yes, sir.

POTENTIAL JUROR: My sister-in-law was raped. And the persons that did it got away with it. It was pretty ugly. So I just thought –

THE COURT: Let me ask you. Would that in any way interfere with both the State and the defendant? Could you be a fair and impartial juror on this case?

POTENTIAL JUROR: I don't think so.

THE COURT: You remember the first things that I said. Both parties are to have a fair trial – a fair jury. But also that it would not interfere with your duty as a juror in this case. Could you do that?

POTENTIAL JUROR: Yes.

THE COURT: And it would not interfere with your ability to be fair to the State and the defendant?

POTENTIAL JUROR: I don't think so.

THE COURT: Thank you.

(WHEREFORE, the juror returned to the panel.)

(WHEREFORE, individual voir dire was held with Anna Hall, Juror number 29.)

THE COURT: Yes, ma'am. Your name please.

POTENTIAL JUROR: Ann Hall.

THE COURT: Yes, ma'am.

POTENTIAL JUROR: My brother was convicted of a [20] sexual molestation.

THE COURT: Would that in any way interfere with your ability to give both the State and the defendant a fair and impartial trial in this case?

POTENTIAL JUROR: I would think so.

THE COURT: Yes, ma'am. You will be excused. Thank you.

(WHEREFORE, the juror returned to the panel.)

(WHEREFORE, individual voir dire was held with Meredith Cobb, Juror number 9.)

THE COURT: Your name please.

POTENTIAL JUROR: Meredith Cobb.

THE COURT: Yes, ma'am.

POTENTIAL JUROR: I have been molested.

THE COURT: Would that interfere with your ability to give both the State and the defendant a fair and impartial trial?

POTENTIAL JUROR: (No response).

THE COURT: Remember the two things I said. The parties have a fair jury and that you are comfortable with what you have to do.

POTENTIAL JUROR: I don't think I would be.

THE COURT: I'm going to excuse you. Thank you for coming forward.

(WHEREFORE, the juror returned to the panel.)

[21] (WHEREFORE, individual voir dire was held with Rebecca Jenkins, Juror number 43.)

THE COURT: Yes, ma'am.

POTENTIAL JUROR: Rebecca Jenkins. I have been a victim of a sexual battery.

THE COURT: Would that in any way interfere with your ability to be a fair and impartial –

POTENTIAL JUROR: Yes, sir.

THE COURT: All right. Thank you.

(WHEREFORE, the juror returned to the panel.)

(WHEREFORE, individual voir dire was held with Charlene Hammond, Juror number 30.)

THE COURT: Your name please.

POTENTIAL JUROR: Charlene Hammond. As a teenager, I was a victim of a sexual molestation.

THE COURT: Would that in any way affect your ability to –

POTENTIAL JUROR: I don't know.

THE COURT: I'm asking in the context as I said earlier, that the parties have a fair trial but also that you are comfortable in doing what you have to do.

POTENTIAL JUROR: It could influence me.

THE COURT: It would?

POTENTIAL JUROR: (Nods head affirmatively).

THE COURT: I'm going to excuse you. Thank you for [22] coming forward.

(WHEREFORE, the juror returned to the panel.)

(WHEREFORE, individual voir dire was held with Lane Mauldin, Juror number 55.)

THE COURT: Yes, sir. Your name please.

POTENTIAL JUROR: Lane Mauldin.

THE COURT: Yes, sir.

POTENTIAL JUROR: My wife's sister's kid's father were convicted of molestation also.

THE COURT: Okay.

POTENTIAL JUROR: I'm pretty sure it's going to affect me.

THE COURT: All right. It would affect you?

POTENTIAL JUROR: Yes.

THE COURT: So you could not give both parties a fair and impartial trial?

POTENTIAL JUROR: Excuse me.

THE COURT: You could not give both parties a fair and impartial trial?

POTENTIAL JUROR: No.

THE COURT: All right. Thank you.

Yeah, excuse him.

(WHEREFORE, the juror returned to the panel.)

(WHEREFORE, the judge resumed jury panel qualification.)

* * *

[27] Number 98, Charles Wood. What says the State?

MR. BRANDT: May I approach, Your Honor.

(WHEREFORE, a bench conference was held off the record in the presence of the jury.)

THE COURT: Renew the motion if you would please. You may be seated.

MRS. WHITE: Present the juror.

THE CLERK: What says the defense?

MR. BRANDT: Excuse him.

THE CLERK: You're excused from this case, sir.

Number 31, Ruth Howell. What says the State?

MRS. WHITE: Present the juror.

THE CLERK: What says the defense?

MR. BRANDT: Excuse her.

THE CLERK: You're excused from this case, ma'am.

Number 35, Patricia Helm. What says the State?

MRS. WHITE: Present the juror.

THE CLERK: What says the defense?

MR. BRANDT: Seat her.

THE CLERK: Please have a seat in the jury box. Number 105, Terry Franks. What says the State?

MRS. WHITE: Present the juror.

THE CLERK: What says the defense?

MR. BRANDT: Seat her.

THE CLERK: Please have a seat in the jury box.

* * *

[29] **MRS. WHITE:** Please excuse the juror from the trial of this case.

THE CLERK: You're excused from this case, sir.

Number 46, Verner Lay. What says the State?

MRS. WHITE: Present the juror.

THE CLERK: What says the defense?

MR. BRANDT: Excuse him.

THE CLERK: You're excused from this case.

Number 10, John Conway. What says the State?

MRS. WHITE: Present the juror.

THE CLERK: What says the defense?

MR. BRANDT: Excuse him.

THE CLERK: You're excused from this case, sir.

Number 96, James Whitfield. What says the State?

MRS. WHITE: Present the juror.

THE CLERK: What says the defense?

MR. BRANDT: Excuse him.

THE CLERK: You're excused from this case, sir.

Number 40, Thomas Horn. What says the State?

MRS. WHITE: Present the juror.

THE CLERK: What says the defense?

MR. BRANDT: Do I have any?

THE CLERK: No, we're just being courteous. Have a seat in the jury box.

Alternates?

[30] **THE COURT:** Two alternates. Two and one.

THE CLERK: Number 17, Melissa Evatt. What says the State?

THE COURT: On alternates, it's two and one.

MR. BRANDT: Is it?

MR. BRANDT: Two and one on alternates.

MR. BRANDT: Okay.

MRS. WHITE: Present the juror.

THE CLERK: What says the defense?

MR. BRANDT: Seat her.

THE CLERK: Have a seat in the jury box.

THE COURT: Actually, we're going to need two chairs. Get another chair.

THE CLERK: Number 18, William Falandys. What says the State?

MRS. WHITE: Present the juror.

THE CLERK: What says the defense?

MR. BRANDT: Seat him.

THE CLERK: Please have a seat in the jury box.

THE COURT: All right. Subject to the motions previously made, is there any reason that this jury could not be sworn for the trial of this case from the State?

MRS. WHITE: No, sir.

THE COURT: From the defendant?

[31] **MR. BRANDT:** No, sir.

THE COURT: Mr. Horn, you are sitting in the foreperson's seat. So I'm going to let you serve as the foreperson of this jury. At this time, I'm going to ask you to

go with the bailiff. And he will show the jury room that you will be using this – for the trial of this case.

As I understand it, Madam Solicitor, we will not start the trial until Wednesday morning?

MRS. WHITE: Yes, sir. May we approach, Your Honor.

THE COURT: Certainly.

(WHEREFORE, a bench conference was held off the record in the presence of the jury.)

THE COURT: All right. Mr. Foreman and Ladies and gentlemen of the jury, as I said, I'm going to ask you to retire to the jury room. We will not start the trial of the case until Wednesday morning. In fact, we're going to start a little bit later Wednesday morning because I need to take up some matters with the attorneys before I do start the trial.

First of all, let me say this. The only three reserved seats in the courtroom in the jury box are the foreperson's seat and then the two alternates. Everybody else can sit anywhere they want to in the

* * *

[37] while the jury retire from the courtroom.

(Jury panel exit at 4:46PM)

THE COURT: From the Solicitor's investigator I'm advised that there are not jurors in the courtroom. We will now take up the motion made during the selection of the jury. Mr. Brandt, please state your motion.

MR. BRANDT: Your Honor, the one juror Mr. Wood testify he said he had a sister that had been raped. The perpetrators got away with it. It was an ugly situation. And when he expressed that to you, Your Honor, it appeared that he was deeply troubled and concerned reflecting back upon it. When asked if that would allow him to be a fair and impartial juror, he hesitated but said that he could and it would not interfere with his fairness or impartiality in this case. Your Honor did not excuse him for cause although of course the others did answer everything, tell about situations and then say that they would be biased.

When it came down to the end to the jury selection and he was chosen. And I was required to use one of the peremptory strikes. As a result, I ran out and had to seat that last juror and had no strikes left when Mr. Horn was seated. Therefore, I put on the record that I believe the jury is improperly constituted because I didn't have the rights for an [38] opportunity to strike that last juror.

THE COURT: All right. Madam Solicitor, you got anything you want to offer?

MRS. WHITE: Your Honor, just that there were several jurors that came forward that had some kind of sexual abuse either a perpetrator or a victim. Several of them said yes, I can not be fair and impartial. This juror was very clear that he could be fair and impartial and give both sides a fair trial.

THE COURT: All right. Anything else, Mr. Brandt?

MR. BRANDT: No, that's basically it.

THE COURT: All right. The Court was very concerned about two things. One, that not only the parties have an impartial jury but that the jurors themselves be comfortable in sitting on a jury in this particular jury. I reiterated that on more than one occasion.

And I am confident on this particular occasion when the juror came forward, I reiterated to him one more time to him specifically. And I was advised after carefully deliberation on behalf of the jurors that he could be both fair to all parties. The juror said he could be fair and would feel comfortable in response to the second part of the question in sitting on the jury. I permitted him to be considered or did not [39] challenge him or did not excuse him for cause.

Now, I might note that it was agreed that we would have at least two alternates for the jury in this case. And as it came down, Madam Clerk, we did seat the two alternates. But it came for the selection of the third alternate that we had only three jurors left. Is that correct?

THE CLERK: Yes, sir.

THE COURT: In other words, when you consider the alternate jurors, two for the defendant and one for the State, we would have consumed all the jury. That is not to say that that is the reason the Court selected or did not discharge the juror for cause. But I did not feel that cause under the circumstances of this particular case that a juror after careful consideration and deliberation and satisfied the Court that he could in fact give both parties and al parties a fair and impartial jury that I did not excuse him for cause. The motion is noted. And it is denied.

MR. BRANDT: I think his number was 98.

THE COURT: Excuse me. That would be juror number –

MR. BRANDT: 98.

THE COURT: 98. Mr. Wood who is a white male.

MR. BRANDT: I just wanted to make sure it was

* * *

STATE OF SOUTH CAROLINA	)	IN THE COURT OF
	)	GENERAL SESSIONS
COUNTY OF OCONEE	)	2002-GS-37-236, 237, 238
THE STATE	)	
	)	TRANSCRIPT
VS.	)	OF RECORD
WILLIAM MAX NICHOLSON	)	

October 22, 2002

BEFORE:

HONORABLE ALEXANDER S. MACAULAY, JUDGE

APPEARANCES:

DRUANNE WHITE, ESQUIRE
Solicitor

LARRY C. BRANDT, ESQUIRE
Attorney for Defendant

Susan M. Ahearn, CVR
Official Court Reporter

* * *

[21] to make that clear for the record.

THE COURT: Very good.

MS. WHITE: Your Honor, may I get my cases back?

THE COURT: Certainly.

MS. WHITE: Before we move to the next motion so I can file those? Thank you.

THE COURT: Next motion.

MR. BRANDT: Your Honor, are you going to call them up? Which way do you want them or do you want me to select?

THE COURT: All right, I decide to use the time of filing, which is about a minute apart. The next one would then be the motion to suppress testimony and/or evidence – oh, excuse me, testimony and evidence, or in the alternative, for a continuance. That would be –

MR. BRANDT: Testimony of Ms. Finley?

THE COURT: Let's see – yes sir. All right.

MR. BRANDT: Okay. Your Honor, that motion pretty well sets out the facts from which that occurred. I take it by sending me the notice that she did, Lyn Finley, that she was going into – my understanding of Lyn Finley is a counselor who evaluated William Paul Wheeler and her testimony would be proffered to talk about behavioral characteristics of sex abuse victims. We got the notice on it – I guess it was sent down to [22] my office some time Monday but last Monday I was in Columbia in the Court of Appeals in the hospital annexation case and then, of

course, another day I had to be out of town last week and also one day I had depositions pretty much all day, and what my motion goes to is that if she's calling in expert testimony, which that is a form of expert testimony, then I don't have enough time and have not been given enough time to thoroughly and adequately investigate Ms. Finley's background, number one, to find out whether or not – if there's anything impeachable in there or anything by which her background could be impeached as an expert in those matters upon which she is to testify. I think that if she is going to call in expert testimony I should be given a sufficient amount of time to hire a counter expert to assist me to prepare for her cross examination or certainly to testify, to respond to what she has to say, and I don't feel like with the time frame there that that has been fair to the Defendant. It also affects his constitutional rights to a fair trial and also his due process right. It's pretty much set forth in the motion as to why – what I have – my complaint. And in the event or in the alternative if the Court should deny the motion to suppress her testimony then we would then move for a continuance so [23] that we would be permitted to obtain that counter expert to assist the defense in the preparation of its case and the appropriate presentation of his case.

THE COURT: All right. Madam Solicitor?

MS. WHITE: Your Honor, of course, all of our discovery is ruled by Rule 5. Rule 5-b would be the one that would be pertinent here. Upon request of a defendant the prosecution shall permit the defendant to inspect and copy any results or reports, the operative words, of physical or mental examinations and of scientific tests or experiments. We do not have a result or a report. We do not have a physical or a mental examination and we do not

have a scientific test or experiment. Lyn Finley will be giving generic testimony. She will be testifying that it is common for children to continue to cooperate with their abusers, that it is common for a child not to immediately report child sexual abuse. She has never seen this victim. She has never treated this victim. She has never examined this victim. Your Honor, *State v. Trotter,* which is 473 SE 2d 452 – in this case the defense – the prosecution, I'm sorry, called an expert who had counseled the victim, actually, and he was going to address some of these things that are common misconceptions with the jury as to why a child would [24] continue to cooperate, why a child would not immediately report. Rule 5 does not require the prosecution to disclose the fact that there has been an examination, blah, blah, blah, and I've got those two things, Your Honor, which I would hand up. We gave this to them about two days ago now and believe it or not I'm actually putting cases together at the last minute, too, some last minute touches and this was one of those things – I've been speaking for three weeks at National Prosecution Seminars and then I had a murder trial last week and we did get it to him last Monday. This isn't something that you have to look into a person's qualifications. This is in the literature. There are many cases that cite that this is admissible, talking about the common and the uncommon, and I'll have those when she testifies, but there is nothing to look into with the witness. This is in the literature. They have known from the very beginning that this wasn't an immediate report. They have known from the very beginning that this child continued to cooperate. If you didn't know that you wouldn't have three straight months of sexual abuse and so this is something that they have access to. If they can find literature anywhere that says that children do not continue to cooperate and that children

do immediately [25] report they don't need to investigate Lyn Finley for that, but I submit that doesn't exist.

MR. BRANDT: Your Honor, I'm not sure she's suggesting that I could go out and read a paper and come into court and qualify myself on those issues. Seems to me like there's been a lot of litigation talking about qualifications of expert witnesses and that it's a basic rule of fairness. In the case that she cited that fellow had examined the alleged victim, and I've made a motion – there's another motion to compel disclosure of the reports of two psychologists that's previously –

THE COURT: Well let me ask you, Mr. –

MR. BRANDT: And I haven't been given those yet either, but now I'm not accusing the Solicitor of intentionally holding back and not telling me. She's been busy. I've been busy.

MS. WHITE: I don't have any psychological reports. I didn't know –

MR. BRANDT: That was two days ago that –

THE COURT: Lady and gentleman, if you have anything to say to anybody say it to the Court.

MR. BRANDT: I didn't –

THE COURT: That's the end of that. All right, now go ahead.

[26] MR. BRANDT: I have not accused and I do not submit to this Court that the Solicitor waited until the eleventh hour to give me this intentionally to cause any consternation or concern but this has happened. She has

been busy. I have been busy. After I got it I've had one week –

THE COURT: Mr. Brandt, let me ask you, do you have any authority for the State having to give you any sort of disclosure as to its list of witnesses?

MR. BRANDT: No, Your Honor, but I think in this case when we're talking about expert witnesses it's trial by ambush, but what I'm saying is if she had given me this, and I am asking this Court in fairness to this man who's 56 years old, facing a tremendous amount of time in jail, that basic fairness requires that we be given opportunity to at least know and refute expert opinions, expert testimony, and I'm asking this Court to consider this, based on fairness.

THE COURT: All right, but there again, you don't have any authority for disclosing any witnesses as such, is that correct, other than the basic consideration of fairness?

MR. BRANDT: No sir, other than Rule 5 and Brady disclosures.

THE COURT: Well, that's what I'm trying to find – [27] if there's any authority for it either in the Rules or case law, statutory case law. Anything else?

MS. WHITE: Yes, Your Honor, and in our notice to the defense that I filed, incidentally, we put her credentials. However, I'd point out she works at DSS in Anderson and certainly I can give him her phone number and I'm sure she'll be more than happy to talk to the defense attorney and he can run over all of her credentials.

THE COURT: Well, we're talking about starting this trial tomorrow?

MS. WHITE: Yes sir. Your Honor, she's available. She's been available the whole time. She works at DSS. She's not a hidden witness anywhere.

THE COURT: Well, if you'll forgive me, Madam Solicitor, I find such gratuitous offerings somewhat late. I think, again, the idea if you find it would be appropriate now it might have been appropriate at the time, but there again, I deny the motion. All right, next motion.

MS. WHITE: Your Honor, may I get my case back? I'm sorry. I'll just forget if I don't do it right away.

THE COURT: Yes ma'am.

MR. BRANDT: Okay, I have a motion to permit

* * *

[30] Supplement and the second part it still refers back to the main – so I've got half and half here but it does require written notice and that it be done outside of the presence of the jury. So I would ask if something does come up that he thinks is – I'm aware of nothing but other than – that Will, when he was about five years old, a girl that I think was in foster care or something with his grandmother fondled him or I don't – did something to him, but that was when he was five so – and this, of course, occurred when he was 15. But if you look at that, that is not admissible under *State v. Boiter,* unless they can show that it was a prior false allegation, and in order to do that they've got to show, first, that the accusation is false; second, that it's not too remote in time; and third, the factual similarity between the prior and present allegation and I would hand

up *State v. Boiter* which is 396 SE 2d 364, which is a 1990 case. Incidentally, the Rape Shield Statute has been upheld by the U.S. Supreme Court in *Michigan v. Lucas.* It has also been upheld in our State Court on *State v. McCoy.*

THE COURT: Mr. Brandt?

MR. BRANDT: Your Honor, I'd invite the Court's attention back to the motion to compel. Disclosure of those things goes also to psychologicals performed upon [31] Mr. Wheeler by I think Dr. Paul Wood at age eight and there was another one in 93 by Dr. Sturkie. That's two reports that have been identified through family court records in an affidavit filed in a family court action by Ms. Lemere between the father and mother of William Paul Wheeler. They're there. I don't know what they say and I've asked that to be presented to me and I think you've got to consider the motion to compel disclosure of that type stuff as well as these sexual activities and everything which I made that motion and I make a motion to admit evidence of Plaintiff's sexual activities and physical neglect and physical abuse to be able to be presented to the Court. So you've kind of got to take these two motions together. Again, I think once they start talking about behavioral aspects of sex abuse victims it kind of opens the door to allow me to delve into that history and at least try to find out and ask the witness even on the stand about those activities, otherwise, basically, you tie the Defendant's hands and say we're not going to let you talk about it but we're going to talk about things in a general way. Then the Solicitor, the prosecution, the State goes along and shows – well, he's done certain things. He's misbehaved. He's done, you know, things that sexual victims do. There's even a statement that [32] the alleged victim gave to law enforcement that seems to indicate that he started having

problems with this in the fall of 96 when his attendance at West Oak, I think, went kind of askew. And so I would suppose that that's a behavioral aspect of a sex abuse victim, and I think that they can't just limit it to certain things and once they open up the field of behavioral aspects they open up the whole field, not just the corner they want you to see. Again, based on fairness, Your Honor, the Defendant in a criminal trial should be given ample information that's within the control of the accusers as well as the State so that he can adequately prepare. There's no way for us to get these things. Dr. Wood did call and tell me that he had his report – he was going to send it to me and I told him no, I didn't want him to send it to me without the Court's direction because I didn't want him to be in any trouble to release anything to me that he shouldn't release. So I would ask you to, whatever way you rule on that –

THE COURT: Let me ask you, I might note that an attorney has approached the Court earlier about a subpoena that he received for one of his files and I told him in an offhand sort of comment – I said the thing to do is to produce it but produce it to the Court in a sealed form and, of course, the Court will [33] then look at any information that is subpoenaed to determine whether or not it is admissible. If it's not admissible then, of course, what is it, it has no significance. Of course, it'd be made a part of the record if it's ruled inadmissible for further review at a later time if that's necessary, but the point is I do feel in talking to the individual that you just mentioned who apparently has a report – tell him to submit it to the Court under seal, just in a sealed envelope, addressed to the Court of General Sessions, Oconee County, and I'll review it at the appropriate time. I'm not going to require the

State, of course, to produce anything the Rule doesn't require. And, of course, the Rule only requires reports and things of that nature that are complete and not notes or memorandum or –

MS. WHITE: Your Honor, we don't have them. I found out the Friday when the discovery, the Defendant's discovery was faxed to me Friday afternoon, and I would ask that, too. I don't want to see them either. I don't think – you know, if you look at the cases the Courts debate that, invading the privacy of a sex victim versus the right to disclosure. There's a case – it's not directly on point but it's in our latest Advance Sheets where they go through that whole –

[34] THE COURT: I know. I'm familiar with it.

MS. WHITE: That's a little different.

THE COURT: Not only have I read the cases but I've also read the editorials.

MS. WHITE: But, Your Honor, I don't want the report either. I would prefer that both of them go to you.

THE COURT: I understand.

MS. WHITE: You do it in your own judgment and that it remain sealed –

THE COURT: All right, we'll do that.

MR. BRANDT: Let me disclose to the Court also that Dr. Ken Sturkie called me and said he's having difficulty locating any report in his file and he has no specific memory of either Ms. Lemere or William Paul Wheeler, but he – I told him that the affidavit, from which I got the clue that they existed refers to 1993. He said he'd

moved his office and that he would have to look further. He's doing that. I take it that I should tell him to do the same –

THE COURT: Anything that he has, and, of course, if he has nothing then that's what he has, nothing.

MR. BRANDT: Okay.

THE COURT: All right, but the point is I don't want anything disclosed to anyone without the Court's [35] review first. And if the Court finds something that is, in the Court's opinion, admissible, then, of course, the Court will advise counsel at that time. Otherwise, the Court will make it a part of the record for review at a later time, if necessary.

All right, now, as far as ruling on the two motions to permit the victim's sexual activities and abuse, alleged sexual activities and abuse, in or to compel disclosure of psychological evaluations, both of those the Court views as motions in limine which I will deny at this time because I think they are premature, if they are proper at all. I might note that, of course, that, what is it, in any case that motions in limine are subject to renewal as well as review, depending on the development of the case. I think that's one of the most important things about *State v. Wade* is that rather than just saying they declined to do that is they set a broad standard of, what is it, two years is acceptable, two years is not – you have to look at it in context of the facts at the time, and the facts, meaning, of course, how they're presented in the proceedings. So I deny also the motion to permit any history or disclosure of psychological evaluations.

MS. WHITE: Your Honor, may I just ask, though, in that ruling if the defense does feel the need to get

* * *

[172] bags of groceries and then he had actually turned over $70 to us that Mr. Nicholson gave him.

Q And did you hear that transaction on the tape occur?

A Yes ma'am. Mr. Nicholson thought it was $100 that he counted out but it was actually $70 when he turned the money over to us. There was just a mistake in him counting it.

Q And have you listened to the tape from that incident?

A Yes ma'am.

Q You have?

A Yes ma'am.

Q And is that a fair and accurate – the one on the victim, is that a fair and accurate depiction of what occurred during that conversation?

A Yes.

Q And were all of those tapes turned over to the defense?

A Yes.

Q I'm handing you State's Exhibit 1 for identification. Was the portion that dealt with the alleged sexual

abuse taken out of the main tape and put on this to play to the jury?

MR. BRANDT: I'm going to object again. She keeps leading.

MS. WHITE: Your Honor, may we approach?

THE COURT: Certainly.

[173] (Bench Conference)

THE COURT: Mr. Foreman, ladies and gentlemen of the jury, I need to take some matters up with the counsel so I'm going to ask you to retire to the jury room for a few minutes. Now please understand that when this happens, when I ask you to retire to your jury room so I can discuss matters of law with the attorneys, we are not trying to keep anything from you as much as we want to be sure what you have is something that you can rely on and is dependable and trustworthy. So therefore, please understand that what we're trying to do is to avoid any confusion in your case so that what you have would be relevant and admissible as far as what you have to make the ultimate decision on. So we're not trying to keep anything from you but I do need you to step out so I can take up some particular matters with the attorneys at this point. I'd ask you to retire to the jury room. It'd just be for a few moments. Do not undertake discussion of the case among yourselves in any way.

(Jury exits jury box at 12:20 p.m.)

MR. BRANDT: I object to what she's fixing to do.

THE COURT: All right, now, put the machine down.

MS. WHITE: Judge, let me –

CLERK: Wait, I think –

[174] THE COURT: I think you should have looked out the door before you started moving equipment around. All right, that's just a well. Go ahead and put it down now.

MS. WHITE: Judge, this is –

THE COURT: No ma'am. I asked you to put the recording device down, please.

MS. WHITE: Oh. Down on the ground?

THE COURT: Yes ma'am. In other words, I'd like things to be the way they were at the time the objection was made.

MS. WHITE: Yes sir.

THE COURT: That will help me. All right, now you ask the question. Go ahead, what was the question?

MS. WHITE: Yes sir. Judge, I am asking the question of is this an excerpt from that.

THE COURT: All right, just a moment. Can you answer that question?

A I haven't heard that tape.

THE COURT: All right, now. Okay, now what?

MS. WHITE: Okay, Judge, last night when we got out of court we went back to Anderson, got the machine and made the excerpt based on the ruling and so I would ask – I think the defense attorney had said last night he wanted to hear it before we played it anyway. So I

[175] thought we would play it – the jury's out – go ahead and play it because this witness is not going to be able to recognize this. He wasn't here when the motion was finally ruled on –

THE COURT: Well I think you'd know by now how you get such tapes into evidence. You have to establish, one, that the person who made the tape was knowledgeable of how the tape was made, two, the equipment that was used and that it was working, and, three, that it's an accurate reflection of what it says it's to be.

MS. WHITE: And he said that on the whole tape. The whole tape we admit through that but the –

THE COURT: Well, I'm sorry. Ma'am, please excuse me. The fact that he did something somewhere else – this was something you should have done this morning. Now I don't know if Mr. Brandt – I understood he objected to it but if he doesn't object to it and he wants to go ahead and do it that'd be fine.

MR. BRANDT: No sir. I object.

MS. WHITE: Well, then, Your Honor, I'd ask for a break and let's make another tape and –

THE COURT: Well, I'm going to – Ma'am, I am going to give you a break but this is going to be the only time I give you a break, and no pun intended, because [176] what I intend to do is have this case flow like it should. Now there's no special rules for anybody, State or Defendant. The rules are the same. If you're going to introduce a piece of evidence you have to lay the foundation for it. The foundation for getting a tape recording in is what?

MS. WHITE: The foundation is that the original tape was taped properly –

THE COURT: No ma'am. I'm asking –

MS. WHITE: That it's fair and accurate.

THE COURT: Please, I want to be sure that you understand what you're going to do when you get out of here. What's the foundation for getting a tape recording in?

MS. WHITE: Your Honor, as the Court –

THE COURT: No, in any case.

MS. WHITE: You're asking me. I'm giving you the answer. I can't lie. The answer is you take the original – I've done this every time –

THE COURT: No ma'am. Just – apparently you don't understand. In order to get a tape recording in – now look at me –

MS. WHITE: Yes sir.

THE COURT: In order to get a tape recording in the witness has to be the one that made the tape [177] recording. Is that correct?

MS. WHITE: No sir. I've never had that happen. On the original tape, yes.

THE COURT: Well, let me – therefore, since you've never had it happen let me just instruct it to you. If you are going to get a tape recording in it has to be reliable. And the way we establish the reliability of tape recordings, of videos, of photographs or anything else that is a reproduction of something else is that the person who

made that recording – one, you have to establish that he knows what he's doing or she knows what she's doing; two, that the equipment she used was – working or he was using was working; and, three, that what the product is is an accurate representation of what was recorded. Now, I'm going to give you the break to do that but you're not testifying in this case. Now if you want to testify, I will swear you and make you a witness, but you also understand what that means, too.

MS. WHITE: Yes sir.

THE COURT: Okay. So now I'm going to give you a break. You go ahead and be sure that this witness can qualify the exhibit that you intend to use.

MS. WHITE: Your Honor, if we're going to redo the video and redo the tape then I am going to ask for a [178] lunch break at this time because that's going to take some time. You're saying we've got to go back to the original tape and I'm not sure – I've never – I'm not meaning to be flippant at all. As I understand the law, you've got to say yes, the pictures are fair and accurate, the tape recording is fair and accurate. I heard it happening. That is a fair and accurate portrayal and this is an accurate whatever – excerpt, I guess is the word. I am not meaning to be flippant but really that is what I understood it to be.

THE COURT: Well have you done that? Have you done it? This witness hasn't even heard the tape that you're going to introduce into evidence.

MS. WHITE: And, Your Honor, last night I was told by the defense attorney that he didn't want anything

introduced until he listened to it. So we have the jury go out. We play the tape and –

THE COURT: Well, ma'am, please, I don't know what you're trying to do but otherwise just understand you did just state what you're supposed to do to get a witness to introduce evidence. And again, if you want to introduce evidence about what you did last night, that's fine, but you're going to do it from the stand as a sworn witness. So now you go and you prepare your witness. I am somewhat reluctant to declare a lunch [179] break but inasmuch as we need some help here I guess I'm going ahead and let you do that. What time do you want to come back, Madam Solicitor?

MS. WHITE: Your Honor, I'm still unsure of the ruling. I'm really serious. I mean I'm not arguing. I am very unsure of the ruling as far as you telling me what I need to do.

THE COURT: Let's do this. I'm not – there's no reason to argue with me.

MS. WHITE: I'm not meaning to argue.

THE COURT: I say there's no reason to be concerned about arguing with me because I'm not going to argue with you. I have no reason to but I will say this. I will apply the Rules of Evidence. Now you try your case as you want to and I'm giving you an opportunity to prepare yourself on this particular item. Any time you're going to use a recording, video or audio, the rules are very clear. So go ahead –

MS. WHITE: May I just have one minute because I –

THE COURT: Certainly.

MS. WHITE: May I could approach the bench.

THE COURT: Certainly.

(Bench Conference)

THE COURT: All right, state your question that you just put to us at the side bar. You're not sure [180] about what?

MS. WHITE: Oh, okay, Judge. I have introduced testimony that this witness listened to the whole conversation and he was in on the taping –

THE COURT: But that's not what you're introducing. You're trying to introduce a tape.

MS. WHITE: Yes sir, and that he listened to the whole tape that was complete and it was fair and accurate. Now, as I understand it all we have to do on this tape is he's –

THE COURT: How does he know if that's the same tape?

MS. WHITE: Well that's why I wanted to play it so he could –

THE COURT: But you had the jury here when you wanted to play it. Now that's fine. Please understand, you think – you're getting along now. Go ahead. Anything you want to introduce the witness has to testify that it is an accurate recording, in this case.

MS. WHITE: And I understand that and my question is I have never heard that he has to actually perform the taping of the excerpt in order to get it in as

long as he hears the whole thing. He heard the whole thing. It's fair and accurate and this is a fair and accurate [181] excerpt of it.

THE COURT: Very good.

MS. WHITE: So I just want to make sure I'm okay on that –

THE COURT: No ma'am. Listen, you put the witness up that was operating the equipment. You need to ask him if the equipment was operating on that date. He's already said that he had trouble with two, but that's all right. Next you have to ask him if the recording that you're going to introduce is an accurate representation of what was heard that day.

MS. WHITE: Okay, I just want to make sure he doesn't have to re-record the excerpts.

THE COURT: Why would he have to do that – unless you plan to put something else in?

MS. WHITE: All right, I just wanted to make sure –

THE COURT: Why can't you –

MS. WHITE: All right, before we broke for lunch I wanted to make sure of that because I – I was misreading what you were saying.

THE COURT: Well, let's do this. I regret that I have taken up so much of the time in this court but I am no longer going to give any advisory opinions. I'm going to just rule on the evidence. I did want to make things move quicker if I could. I understand, now, [182] that, what is it, there are questions about it. But please understand that

you can do whatever you would like. Mr. Brandt, you can do whatever you'd like. I'm going to apply the Rules of Evidence to all evidence that comes in. If you don't understand, I apologize. I can't – I don't know how to explain and I don't think it's within my capacity to explain everything.

MR. BRANDT: Your Honor?

THE COURT: Yes sir.

MR. BRANDT: Your Honor, I would object to the Court's assistance to the prosecution in such depth and detail. I want that on the record.

THE COURT: All right. So noted. Would you rather have this witness stand down? I'll let you, what is it, talk to him later and we can go with another witness.

MS. WHITE: No sir, I'd rather now. And, Your Honor, I would also ask that the witness be instructed not to discuss this case with us or anyone else, just to listen to the tape and that's all because I don't want any – I don't want any – I just think that would keep the record clear that we haven't tried to influence his testimony at all while he's testifying.

A I understand.

THE COURT: I think you've probably been in court [183] as much as anybody and you know that once a witness is sworn, and I would have given you the instruction, that you are not to discuss your testimony with anyone else. However, if there's an exhibit that the State wishes to introduce through you obviously you have the opportunity to view that exhibit that they want to use you for.

A Yes sir.

THE COURT: All right, very good. Thank you very much. All right, note your objection, Mr. Brandt. Overruled. Ask the jury to come back. I'm going to ask the jury to come back at – let's see, is it 12:30 now? I will ask them to either come back at one thirty or two. I'll leave it up to them. All right, ask the jury to join us, please.

(Jury enters jury box at 12:35 p.m.)

THE COURT: All right, let the record reflect that the jury and alternate are in the jury box. Mr. Foreman, ladies and gentlemen, the matter I had under consideration will take a little bit longer than expected so I'm going to – and I don't like to do this – normally I do not break a witness' testimony, in other words, interrupt a witness' testimony before they complete their testimony, but in this particular case it becomes necessary for me to do that and I'm going to [184] suggest that you go to lunch. Now, Mr. Foreman, this will be your first duty. I want you to check with the jury and ask them what time they would like to come back – in a little bit less than an hour, one thirty, or two o'clock. Now if you would just – it'd be a consensus, not a unanimous verdict but a consensus.

FOREMAN: (Confers with jury) One thirty.

THE COURT: One thirty, all right. Very good. All right, you come back to the jury room at one thirty and we'll start at that time. Again, do not undertake the discussion of the case among yourselves in any way. Thank you very much. Everyone else remain seated while the jury retires from the courtroom.

(Jury exits jury box at 12:36 p.m.)

THE COURT: Now, Mr. Witness, as you understand, you are not to discuss your testimony with anyone, however you are able to review any evidence that has been marked for admission. If you can identify it then, of course, that will be something for the Court to do, but you may discuss the evidence, the physical evidence, but not your testimony.

A Yes sir.

THE COURT: All right, anything from the State before we recede for lunch?

MS. WHITE: No sir.

[185] THE COURT: From the Defendant, other than the renewed motions?

MR. BRANDT: No.

THE COURT: Overruled. All right, we'll stand in recess until one thirty. Let's try to get everything done before we come back.

(Recessed at 12:37 p.m.)

(Resumed at 1:35 p.m.)

THE COURT: All right, we're back on the case of *State versus Nicholson.* Madam Solicitor, did you get your copy of page 281 of South Carolina Evidence by Danny R. Collins, Authentication of Evidence?

MS. WHITE: Yes sir, I did. Thank you.

THE COURT: Mr. Brandt, did you get your copy?

MR. BRANDT: Yes sir.

THE COURT: By the way, just for the record I made those available to both counsel at the request of the Solicitor in order to expedite any further questions of admissibility or authentication of evidence. All right, anything from the State before we bring the jury back?

MS. WHITE: No sir.

THE COURT: From the Defendant?

MR. BRANDT: None.

THE COURT: All right, ask the jury to join us. [186] All right, let's do this – the witness, could you retake the stand, please? Thank you.

(Jury enters jury box at 1:38 p.m.)

THE COURT: All right, you understand you're still under oath?

A Yes sir.

THE COURT: Very good. All right, let the record reflect the jury and alternate are in the jury box. Mr. Foreman, ladies and gentlemen of the jury, we will now continue with the examination of this witness. Madam Solicitor?

MS. WHITE: Yes sir.

Q Officer Jenkins, let's go back to these tapes. We're still on December 20th.

A Yes ma'am.

Q Let's not move to the next one. I believe you said that you had three tapes going, is that right?

A Yes ma'am.

Q And will you briefly say what those were?

A One tape, once again, was the video tape. One tape was the wireless transmitter tape. And then one tape would be a Sony digital recorder tape.

Q And which one of those malfunctioned?

A Actually it was the video where the audio lead came unplugged to the video. You have video. You just [187] don't have sound to the video.

Q And what about the other two tapings? How did they go?

A The other two were fine.

Q And have you operated this equipment before?

A Yes ma'am.

Q I believe you said you've been in narcotics for a while?

A Four years, over four years, yes ma'am.

Q And throughout that time period once again would you briefly state what your experience was in dealing with these various taping devices?

A I've had different type training and then just pretty much a lot of it's just "on hands", getting the equipment and playing around with it, hooking up video cameras, recording from video, hooking up audio leads, running the wireless, transmitter, just different surveillance equipment. And if I can inject one more thing – we have a system to back up a system to back up a system. I mean that's why we come with the different recordings

that we do. It's one to back up our other one just for those reasons.

Q And I believe you said you actually listened to the whole conversation as it happened?

A Yes ma'am. I was there the whole time.

Q All right, and were tapes made of these conversations? [188] I think you just said that.

A Yes ma'am.

Q All right, and were they fair and accurate?

A Yes ma'am.

Q Now I hand you State Exhibit 1 for identification. Will you look at that?

A (Witness complies)

Q Do you recognize it?

A Yes ma'am, I do.

Q How do you recognize that?

A This is a tape. It's an excerpt of the original tape made 12-20 2001. It has my initials and date on it.

Q And have you reviewed that tape?

A Yes ma'am, I have.

Q And is that tape an accurate portrayal of the conversation that you actually heard and listened to?

A Yes ma'am.

Q Other than to delete the portions that didn't deal with this, has anything been changed or altered in any manner other than to just focus in on this part of the tape?

A No ma'am.

Q And you actually heard the original conversation?

A Yes.

Q And again, has that tape been changed or altered at all [189] to change that portion of the conversation that the State is introducing?

A No.

MS. WHITE: Your Honor, I'd move to admit State's Exhibit 1.

THE COURT: Any voir dire?

MR. BRANDT: No.

THE COURT: All right, State's Exhibit #1 for ID is now admitted into evidence.

(State's Exhibit #1, cassette tape, marked and entered into evidence without objection)

Q All right, let's go to the – when did you next see the victim, Will Wheeler?

A December 27, 2001.

Q And what was the purpose this time?

A Once again it's to get the equipment going, meet with Mr. Wheeler and go to Max Nicholson's residence in Salem.

Q And how did it occur this time?

A From the beginning –

Q Mmm hmm, just go through what taping devices were used and that sort of thing.

A Okay, when we met we got Mr. Wheeler – once the Sony digital recorder – we'd actually recorded a phone conversation just to see if Mr. Nicholson was at home.

* * *

[243] LYNN CHERRY FINLEY RECROSS EXAMINATION BY MR. BRANDT:

Q You're telling me that you've never had one of these cases you worked on where the perpetrator pled guilty?

A Not one I've worked on.

MR. BRANDT: Thank you. Nothing further.

MS. WHITE: Your Honor, may the witness be excused?

MR. BRANDT: Yes sir.

THE COURT: All right, without objection you may be excused. Thank you, ma'am.

MS. WHITE: The State calls William Wheeler.

WILLIAM PAUL WHEELER, after first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. WHITE:

Q What's your full name?

A William Paul Wheeler.

Q What's your date of birth?

A 03/25 1980.

Q And when you were in high school what was the status of your parents, their marriage?

A They were divorced since I was five.

Q And do you recall where each one of them lived?

A My dad lived in Westminster and my mom lived in Walhalla.

Q And what was your living situation throughout high

* * *

[303] MR. NICHOLSON: I do.

THE COURT: All right, very good, and if you're not here at that time we'll continue in your absence?

MR. NICHOLSON: (Indicates the affirmative)

THE COURT: Thank you very much, sir. All right, we'll see you in the morning at nine o'clock.

(Recessed at 5:40 p.m.)

(Resumed October 24, 2002, at 9:20 a.m.)

THE COURT: All right, we're back on the record in the case of *The State versus Nicholson*. At the request of the attorneys who had subpoenaed certain documents relative to psychological evaluations done of the victim, Will Wheeler, William Paul Wheeler, I think it is, some done prior to the incident here involved, I received them sealed and had them marked as Court's Exhibits. Five is a copy of Dr. Paul B. Wood's statement from 11-5-88. There's another copy of Dr. Wood's – that same statement

from 11-5-88 the came from William F. Derrick, and Dr. Wood furnished Court's Exhibit 6. I've asked – I have reviewed them. I found nothing in Dr. Paul Wood's report and I discussed in camera with the attorneys and – well, first of all I'll just ask, anything from the State? I've declined to let that report be used.

MS. WHITE: Judge, may we go off the record?

[304] THE COURT: Certainly.

(Off the Record)

THE COURT: All right, let's go back to the report of Dr. Wood which is Court's Exhibit 5 and 6. The Court's reviewed it and has declined to admit it based on the confidential nature of the report – it does not find that there would be just cause to introduce it in this matter. Moreover, if it did have probative value that probative value would be outweighed by the nature of the report which is that it's remote as well as I would find that it would be somewhat cumulative because the testimony is a repeat of what's reflected in it. It's already been discussed to some, degree as to problems in the family.

MR. BRANDT: Now back on the record I'd move to admit the psychological report of Dr. Paul Wood. There was an issue concerning the Family Court Order, a prior case – I don't have that number. A test was done in 1988. concerning William Paul Wheeler at age eight. Anyway, there was a psychological report issued in the case between Teresa Lemere and her ex-husband, William Paul Wheeler's father. I would state that I believe that the test done and the report or the testimony of Dr. Paul Wood should be permitted. We've discussed those issues – the Solicitor in her opening statement [305] and throughout

the course of her witnesses she has basically talked about the reason for delay, that my client was a predator on the weak people that had poor home lives – she's also called an expert that talked about some characteristics, talked about delayed reports of sexual abuse and when I asked the expert witness about false reports I didn't have this or know about this incident so I couldn't cross examine on it. I object to not having it before. I think it was in the Court's possession, but notwithstanding that, I think it has relevance on William Paul Wheeler because it merely allows me to go further into the issue, delve further and thoroughly and fully explore that relationship that the Solicitor had talked about and injected into the case. So I think that she's opened the door for me to put in this type testimony on the issue of the report. Certainly it does touch on matters that have already been asked on cross of William Paul Wheeler and there is evidence – I think certainly it's not that cumulative because there are some new matters in there and things that was elicited from the alleged victim in this case on cross. It went to the stepfather more so than the father. So I think that that's not unduly cumulative. It is limiting my right to further delve into matters that were gone into [306] on direct.

THE COURT: All right, Madam Solicitor?

MS. WHITE: I'd just object on 403, Your Honor.

THE COURT: All right, again, the motion is denied. Not only the report but also the testimony of Dr. Wood would be disallowed. To be sure the record's clear, let the record reflect that the Defendant is in the room with his attorney and has been advised that he may ask any questions of his attorney.

Now the next one is the report of Dr. Sturkie which is Court's Exhibit #7, and that report, as I say, has some notes, some transcribed notes of Will Wheeler. The report itself is dated October 23, 2002 and is a synopsis of the report from April 17, 1992, April 27, 1992, May 6, 1992, May 13, 1992, July 10, 1993 and July 12, 1993. Again the Court has reviewed it. There is one thing that is of concern to the Court as far as this particular matter and that is an allegation of an alleged fellatio by a 16 year old foster child. The report doesn't reflect when that might have occurred but obviously it occurred prior to April 17, 1992 which was prior to the alleged offense in this case. All right, the Court has reviewed the file and upon that review has declined to permit it, however – Solicitor, do you have anything else to add?

[307] MS. WHITE: Your Honor, it's my understanding this is the one I talked about when I first – when we addressed the Rape Shield Law in the beginning of the case. It was a foster child at the grandmother's. She walked out to the car and – a female, girl, actually, who was a foster child during this period – Will was supposedly around five and she sent the girl back. I would just cite *State versus Bolter* and *State versus Sprouse* – that in order to get in prior allegations of sexual abuse they must first show that the accusation was false. Then if it was false, if it's too remote in time and the factual similarity. And I don't know if I said it but I'd also cite *Sprouse.*

THE COURT: All right, Mr. Brandt?

MR. BRANDT: Your Honor, again, I think the matters contained in this report is not just a transcription of notes – there was also in that file a test or whatever that was performed upon Will Wheeler. It appears to be

filled out, questions, as part of that underlying basis for these notes and observations or diagnoses. In fact, there is one in there where he basically says he has an adjustment disorder with mixed disturbance of emotions and conduct which I will proffer. But then he goes on – he reveals the sexual abuse, fellatio by a 16 year old foster child. The [308] State has introduced evidence from an expert witness who talks about delayed responses of sex abuse victims. I think that certainly if another act of fellatio has occurred and he's now accusing my client of fellatio that this could be basically a transferred type – a transferred blame, blaming someone more recent, more in his presence, because of something that had been bothering him for years. The Solicitor has talked about, again, the child's past. I think that goes to that, his emotional disturbances and so we would ask – I realize that the notes are – 4-27-92 is I think less helpful to the defense but there is some things in there that I think should be gone into. The 5-6-92 it just says child is reiterating previous themes – also completed several standardized instruments and that was probably this incomplete sentence thing, but it says I am happiest when I get my way. That goes directly to setting up the argument that I would offer to the jury as to why the boy may be doing the things that he's doing now and accusing my client. He has some other things that I think it goes to show not just that there was a family that was torn apart here but it went really deep and I think I'm entitled to explore that again for those reasons cited on the admissibility of the Paul Wood report because the Solicitor has opened [309] the door for the same reasons, the expert as well as her mentioning the weakness and the fact that the boy comes from a broken home. Again, I think that it unfairly prejudices my client by not allowing me to put up that evidence. I'm not certain that – I guess – I mean I've

read the report and I will certainly stay away from those matters as directed by the Court but now my question is that if any other family members testify do I get to ask them about it – and I take it that your ruling would encompass that, too. So again my objection to your ruling is that it unfairly limits my cross examination of the witnesses.

THE COURT: What do you say about that, Madam Solicitor?

MS. WHITE: Your Honor, are we talking about the *Boiter* part, the sex abuse part of this? Or are we talking about arrests and that sort of –

THE COURT: Well, let me say as to the sex abuse, the alleged sex abuse, I mean when he was five years old and what occurred with the 16 year old perpetrator I do not find that as a false report such that it would be a transfer to your party so therefore I think *Boiter* applies to that. But I do have some problem with in that part of that report is a statement made by the alleged victim himself.

[310] MS. WHITE: And again, Your Honor, I do think that when the victim was 12 years old and filling out an incomplete sentence report – I just think that's –

THE COURT: He was 12?

MS. WHITE: Yes sir.

MR. BRANDT: That's certainly not too remote. That's only three years prior to the time that he says these other allegations were made, and I don't think *Boiter* applies because in *Boiter* they were –

THE COURT: No, *Boiter* – oh, you're talking about the sexual –

MR. BRANDT: The sexual stuff I don't think *Boiter* applies to that because in that case they were trying to say this is evidence that she has made a prior false accusation. That's not the purpose for which the Defendant would offer it. The defense would offer it to show that, in fact, it is true. It is true and that is the reason it's a transfer of identity or aggressor – I don't know if it –

THE COURT: Do we have any testimony for that proposition?

MR. BRANDT: On what?

THE COURT: On transferred identity –

MR. BRANDT: No because I've just now been given this. I'm just now aware of it and in that regard I [311] would also further make a motion to say that I should get this – the fix would be that we should recess until after I have been able to have an expert witness review it and prepare that testimony.

MS. WHITE: Your Honor, I would submit that under the Rape Shield – I'm looking for it – this being a recent case – the argument is, you know, this happened and that's where the child got it and what the Court said is when you have a very young child where a child would not know about sex had it not happened they would not be able to get around the Rape Shield using this transferred knowledge – it'd limit that – it'd limit it to – in other words when you've got a six year old testifying or a nine year old testifying because they would never have heard about having oral sex or – I believe that's this case – let me see –

This is *Grovenstein* which is April 24, 2000.

MR. BRANDT: *Gravenstein?* (Sic) Have you got the opinion number?

MS. WHITE: No, I got it off the Advance Sheets –

MR. BRANDT: Well that's what I mean.

MS. WHITE: Oh, oh, the Opinion Number – okay, 3156.

MR. BRANDT: Court of Appeals?

MS. WHITE: Court of Appeals.

[312] [Opinion is read into the record – *State v. Grovenstein,* 335 SC 347]

MS. WHITE: I've got it highlighted there, Your Honor. They limit their holding to that.

(Court Reviews Opinion)

MR. BRANDT: Your Honor, my client indicates he would like to confer with me and needs to use the restroom. I'm stepping out, too, for the record.

(Defendant and Counsel Exit Chambers)

(Brief Recess – Resumed)

MR. BRANDT: Thank you, Your Honor. We have conferred and returned.

THE COURT: All right, anything else from The State?

MS. WHITE: No sir.

THE COURT: Anything else from the Defendant?

MR. BRANDT: No, other than the fact that I guess what I would be doing is I would say that I'm entitled to that. As far as it being disclosed to me today even though the people were under subpoena – they just got it, too, but with the Court's ruling I don't have any problems with the way we've handled it but I think that we ought to go into recess until tomorrow so that I will have a full opportunity to develop my defense.

THE COURT: Well, the only thing is – I've read [313] *State versus Grovenstein* and although they said it was error to exclude the testimony of a prior sexual event where the alleged victim was six or seven years old because it would be an explanation of how such a young person would know specifics as to sexual conduct in this particular case obviously at the time the events occurred. Based on his testimony, he was somewhat more advanced than six or seven. I think he was 15 at the time. The Court apparently found that it was harmless error in that it was not critical as to the credibility of the testimony, even at the tender years here. The Court was provided the report of Dr. Sturkie. I looked over it before trial this morning – actually the Court reviewed it during the trial of the case yesterday and today. I do not find that the information is such that it would be admissible here. The probative value, if at all, would be outweighed by the prejudice and it would violate confidentiality as well. I'll overrule the motion.

MS. WHITE: Your Honor, he's the one who developed that apparently a while back out of some Family Court files that he had. He knew about this long before we

did and I just wanted to put that on the record. He could have filed for these records long ago.

THE COURT: All right, anything else?

[314] MR. BRANDT: What about this other part?

THE COURT: What do you say about that, Madam Solicitor?

MS. WHITE: Your Honor, again, in that case the victim was 12 years when it occurred. It had nothing to do with any of this and – one is I am happiest when I get my way. If I could be an animal I would be a gorilla. I just don't think it has – I think – I just don't think it's relevant under 403.

MR. BRANDT: I think it is.

THE COURT: I would note that – I'm going to hold that part of the file out.

MR. BRANDT: I think that's part of that other thing. It'd include also this note.

THE COURT: Would you let me finish?

MR. BRANDT: I'm sorry.

THE COURT: This portion of the report might have some value as far as credibility but these things – William Paul Wheeler is making some statements during, this –

MR. BRANDT: That's true and if I could call him back to the stand now because I didn't have it available for cross. Pursuant to the Rules of Evidence if I could recall the witness –

THE COURT: That's what I'm saying. I think you'd

* * *

[398] that, and when you get back in the jury room if you want to hear these tapes again you can hear them ten times if you want to because that's the crux of the matter here. That is the crux of this case. If you didn't have those tapes where the defendant is agreeing with this victim when he talks about being, quote, sucked off, unquote, would you have believed Will? The tapes are the only thing that prove this victim's claims. Do you think when he was 15 if he had told anybody this had happened anybody would have believed him?

All right, let's look at the tapes. I'm going to put some language up from the tapes – the tapes have been introduced. Let's look at what the defendant said in these tapes. I typed out some of the things that were said on the tapes. Let's start with the one on the 20th. We start on the 20th – on the 20th the CI, the confidential informant, the one who was the victim, went in. The defendant: "Are you all right to drive?" "Oh hell, I'm fine, just – hell, I don't know." "Ha, ha – what's on your –" "Look – I don't know." "What? Just what's bothering you?" "I just feel bad, you know." "What do you mean?" "That shit that happened between us that –" "You what?" "The shit that happened between us in the past it just [399] damn –" "What?" "You know what." "Are you getting melancholy?" "No, I ain't getting melancholy. You know – I don't know – problems with things and dealing with things sometimes. I don't know." "That's water under the bridge." "Well, that's easy for you to say. I don't know. Of course it was me getting

sucked off and not you, you know." "You've aged me 20 years in 5." "How's that?"

Okay, let's look this. "It's me getting sucked off, not you, you know." Any protest? Does anybody see over here what are you talking about? Are you crazy? Are you nuts? Uh uh.

Now let's get the next sheet, please. Remember it's just as important what is not said as what is said. "Oh lord, I ain't never been through anything like this – but you're worth it." "Ha ha." "Ha ha." "I don't if what I went through was worth it but, well, maybe I'll get straightened out." "There's nothing wrong with you." "You don't think there's anything wrong with me?" "You ain't perfect." "Well I never claimed to be perfect. I just claimed to have problems." "You sure got a good mind." "Yeah." "Well if you have a good mind then you have it made. You can handle anything." "I don't know if I can handle shit like that or not." "I'm certain you can [400] reconcile it."

Third page, please. "Well, just don't have nightmares." "I'll try not to." "You've got to get back in school and I'll help you." "Yeah." "You've got to get back in school. It bothers me that you –" "Yeah, I know. I hope you hate what happened as much as I did." "Life." "Yeah, that's life." "Well, hell. There are some people who have babies through incest." "I don't know which is worse, you know." "What's on top of that vehicle? Two way?" It's interesting what he says right after this when he sees the antenna on the vehicle – what's on top of that vehicle. Is he suspicious? Why would he say there are people who have babies through incest in this conversation? He knows exactly what this victim is talking about because right after he said you sucked me off he doesn't even deny it.

All right, let's go to the 27th. Now why is he sent back on the 27th? As any idiot can see by looking at that first tape there is no time in it. He'll be able to say well, he was older. So in order to tie that date down, seeing that that would be a defense, the victim goes back. "I hate I brought that up to you last time about that but, you know, it's bothering me." "Oh shit, that's –" "I don't know –" "That's [401] nothing to worry about." "You know –" "Well, you know, it got started in the 9th grade and –." Anything about what are you talking about in 9th grade? That's not 9th grade? What are you talking about, 9th grade? Oh no. You don't have to believe this victim that it happened in the 9th grade because you've got it right here – it started in the 9th grade and what's the defendant's response? "It's a man thing." Victim: "Well, you know –" Defendant: "Everybody does it. Most people lie about it." Do you see – imagine what he was doing, convincing a 15 year did to go along with this. You know, a 15 year old – sometimes when you've got a wolf in sheep's clothing a 15 year old is not smart enough to see a wolf. All they see is the sheep's clothing but now the victim's old enough. Well, we know it got started in the 9th grade and – what's the defendant's response? "It's a man thing." "You know –" "Everybody does it. Most people lie about it." "Well, it's just, you know –" "I'll show you the" – and I think that's really supposed to be Kinsey but it sounds like McKinley on there – "report and the Chapman report –" because see, now the science teacher even has scientific proof people do this. "What's that?" "Everybody does it at one time or another." "They do. All the animals from the f-ing rabbit to [402] the human" – next page, please – "You know?" "Uh uh." "It's not considered to be gay behavior. Fooling around. I ain't never thought you were gay and, hell, I'm not. I'm in sympathy with gay people." "That's the only thing that

bothers your mind is thinking you might be gay but you're not." "No, not by any means." "Well, neither am I." "Well, I just, you know, it just started when I was young in the 9th grade and I don't know. Damn, I was just so young." Now maybe the defendant didn't hear the first one, 9th grade, maybe it just went over his head, but look what happened here. You know, this is before he's hired an experienced defense attorney who can go dig around in his records. And what does this defendant say because, you know what? He doesn't have sheep's clothing on now. This is the wolf. What is his response? "Well, I don't know. It started when I was young in 9th grade and I don't know. I just – damn, I don't know. I was so young." Defendant's response – this defendant seated over here – "9th grade? You were as mature as most 20 year olds and you know it. You were street-wise and if you were f-ed up it was before I knew you." That's what this teacher of children in Oconee County said. "Well, you was peddling oregano in middle school." Next page. "I didn't cause that. [403] I didn't cause nothing. You did what you wanted to do and I didn't plan it and neither did you." "So mark it off to experience." Victim: "Yeah, we'll just call it live and learn, I reckon." Defendant – remember the prior visit was December 30th – "You know, the problem is you did it just before Christmas."

Remember how he confronted him before about saying I didn't like what you did – it nearly ruined my Christmas. I told – I said, well, he's going on a trip so he wanted to give me a little guilt trip. Would you have believed him without that? He picked his prey too wisely. It's not just what he says. Did you hear one denial in there? Did you hear one time that this man said are you tripping on acid or something? What are you talking about?

Well what about the dates? What about the dates? What about the driver's license? He had a permit, license permit. Did you take driver's ed? Sure. Whether you have a license or not you can take driver's ed. It helps you on your insurance rates. Besides it's always a crip course that coaches teach in every high school. How do we know that this happened in 1995? Think about it. I cannot emphasize this is not a haphazard crime. It takes grooming. You saw it going there, even though Will's 22. You

* * *

[431] (Resumed at 3:45 p.m.)

THE COURT: All right, we're back on the record in *State versus Nicholson.* Let the record reflect that the Defendant and attorneys are in the courtroom. The Court's been provided a note from the jury. The jury requests to listen to the tapes and review the written transcript of the tapes, audio and video. Signed by the foreman of the jury. Anything from the State?

MS. WHITE: Your Honor, I would request that the recorder, tape recorder and the video machine be sent back. I don't feel like this is a tape of prior testimony. I think it's like a Defendant's written statement or anything else, physical evidence, which the jury is entitled to examine however they want to, listen to what parts they think they want to hear, and I don't think it's any different than any other Defendant's statement, written or otherwise.

THE COURT: What would you do if they – it got damaged in some fashion in recording or re-recording or rewinding and fast forwarding and all the other?

MS. WHITE: Your Honor, I think there's something you can push. Sherry's here. She usually does it on our tapes.

THE COURT: Well let me ask you if you can push it then that means somebody can unpush it?

* * *

[434] what is it, permit them to listen to the tape and view the video. The only problem is now they're asking for a transcript and the transcript is not in evidence so I don't know how we'd do that.

MS. WHITE: I think they just need to be told the transcript is not in evidence. I believe they can only listen to the. evidence.

THE COURT: All right, thank you very much. Anything from you, Mr. Brandt?

MR. BRANDT: Your Honor, I think as I read the Court's desires is to bring them back into the courtroom and play the tapes for them again and I don't have any objection to that.

THE COURT: We'll play them as long as they want them.

MR. BRANDT: But they want the transcripts of the tapes. I understand the Court is not disposed to allowing that to go back. Certainly I object to that.

THE COURT: Well the record's closed, regardless. It's just how we treat the original evidence now. No transcript came in, and it was proper to use it I think in argument because that was – but not as far as an exhibit. All right, with that I'm going to ask the jury to come in.

Well, before they come in let's get things set up so we can play the tapes.

[435] (COURT'S EXHIBIT #8, Jury Note, marked and entered into the record)

MS. WHITE: Judge, I think we're ready.

THE COURT: All right, Mr. Brandt, anything from the Defendant before we bring the jury back?

MR. BRANDT: No, Your Honor.

THE COURT: All right, let's see.

MR. BRANDT: You want to play the audio first?

MS. WHITE: (Indicates the affirmative)

THE COURT: All right, if there's nothing from the State or the Defendant ask the jury to join us, please.

(Jury enters jury box at 3:55 p.m.)

THE COURT: Mr. Foreman, the Court's been provided a note. The jury requests to listen to the tapes and to review the written transcript of the tapes, audio and video. Signed by the foreman. This is Court's Exhibit #8. The record is closed. In other words, there's no transcript actually introduced. It can be used in the argument and things like that but even the argument now is closed and we can't use the transcript. However, I have tried to provide a little better audio. Moreover, it's the Court's policy I do not send things back to the jury room that might be damaged and I certainly wouldn't want a transcript or [436] a video that might be – but we're going to play both video and the audio tape for you, hopefully

amplified that it might have, what is it, a little better result. All right, Madam Solicitor, if you would, please?

FOREMAN: One question, Your Honor?

THE COURT: Yes sir?

FOREMAN: One question we have is due to the quality of the tapes and the acoustics in here we were not sure if the transcript accurately reflected what was on the tape. That may be part of our question.

THE COURT: Well, would it – counsel approach, if they could.

(Bench Conference)

THE COURT: Let's do this, Mr. Foreman. I understand the total time is 22 minutes for both the audio and video. Let's go through the audio first. Listen to it and if you still have the questions or concerns then I'll try to address them. All right, if you would, please, Madam Solicitor –

(Audio tape is played for the jury)

THE COURT: All right, Mr. Foreman, is there anything else that the Court can do?

FOREMAN: May I ask the jury if they were comfortable or if they want to hear any more? We're [437] fine.

THE COURT: All right, very good. If you'd please return to the jury room and continue your deliberation. When you reach a verdict, please advise the Court. Everyone else remain seated while the jury retires from the courtroom.

(Jury exits jury box at 4:12 p.m.)

(Recessed at 4:12 p.m.)

(Resumed at 4:20 p.m.)

THE COURT: All right, I understand the jury has a verdict. Anything from the State before I bring the jury back?

MS. WHITE: No sir.

THE COURT: From the Defendant?

MR. BRANDT: No, Your Honor.

THE COURT: All right, ask the jury to join us, please.

(Jury enters jury box at 4:21 p.m.)

THE COURT: All right, Mr. Foreman, I understand the jury reached a verdict?

FOREMAN: Yes we have, Your Honor.

THE COURT: On all three indictments?

FOREMAN: Yes sir.

THE COURT: If you would, please, pass it up to the bailiff.

The South Carolina Court of Appeals

The State, Respondent,

v.

William Max Nicholson, Appellant.

The Honorable Alexander S. Macaulay
Oconee County
Trial Court Case No. 2001-GS-37-00236
2001-GS-37-00237
2001-GS-37-00238

ORDER DENYING PETITION FOR REHEARING

November 28, 2005

GOOLSBY, J.: The appellant William Max Nicholson petitions this court for a rehearing. After careful consideration of the petition, the court concludes there is no basis for granting a rehearing.

The court acknowledges it did not give a full treatment to Nicholson's argument that the trial judge erred in limiting defense counsel's cross-examination of his accuser about the accuser's sexual abuse history. We take this opportunity to advise that, after examination of the record citations provided in Nicholson's brief as well as our own review of the transcript, we are unable to ascertain that the issue of the scope of cross-examination had been raised to and ruled on by the trial judge or that the proposed cross-examination had been proffered at trial. *See* Rules 208(b)(4) and 211(b)(1), SCACR (requiring briefs to provide references to where relevant objections and rulings occurred in the transcript); *State v. Hicks,* 330 S.C. 207, 216, 499 S.E.2d 209, 214 (1998) (stating that to be preserved for appeal, an issue must be raised to and ruled on by the

trial judge); *Baber v. Greenville County,* 327 S.C. 31, 41, 488 S.E.2d 314, 319 (1997) ("Absent a proffer, it is impossible for this Court to determine the effect of the excluded testimony."); *McKissick v. J.F. Cleckley & Co.,* 325 S.C. 327, 344-45, 479 S.E.2d 67, 76 (Ct. App. 1996) (noting the appellant failed to "point to specific objections and rulings" as required by the South Carolina Appellate Court Rules, thus leaving the court to "'grope in the dark' concerning the specific allegations of error") (quoting *Connolly v. People's Life Ins. Co. of S.C.,* 299 S.C. 348, 352, 384 S.E.2d 738, 740 (1989)). We therefore conclude that, although the argument concerning the scope of the cross-examination of Nicholson's accuser may have been overlooked in the prior opinion, the omission did not concern a material fact or point of law so as to warrant rehearing the case.

It is therefore ordered the petition for rehearing is denied.

REHEARING DENIED.

HUFF and KITTREDGE, JJ., concur.

[SEAL]

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

(803) 734-1080
FAX (803) 734-1499

February 14, 2007

Larry C. Brandt, Esquire
Larry C. Brandt, PA
P.O. Box 738
Walhalla, SC 29691

Re: The State v. Nicholson, William
2001-GS-37-00236, 00237 and 00238

Dear Counsel:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

"Petition for Writ of Certiorari Denied.

s/ Jean H. Toal C.J.
For the Court

February 14, 2007."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

/s/ Daniel E. Shearouse
CLERK

DES/dmh

cc: Assistant Attorney General Shawn L. Reeves
The Honorable Christina Theos Adams
The Honorable Sallie C. Smith
The Honorable Kenneth A. Richstad

STATE OF SOUTH CAROLINA	)	COURT OF GENERAL SESSIONS
COUNTY OF OCONEE	)	**MOTION TO SUPPRESS TESTIMONY AND/OR EVIDENCE OR IN THE ALTERNATIVE FOR A CONTINUANCE**
THE STATE OF SOUTH CAROLINA, PLAINTIFF,	)	2002-GS-37-0236 **2002-GS-37-0237** 2002-GS-37-0238
VS.	)	
WILLIAM MAX NICHOLSON, DEFENDANT.	)	(Filed Oct. 16, 2002)

The Defendant, William Max Nicholson, by and through his undersigned counsel, hereby moves for an Order of this Court suppressing the testimony of Lynn Finley, an expert witness whom the prosecution only identified to Defendant's counsel on Monday, October 14, 2002 at approximately 5:30 PM upon the grounds that Defendant does not have sufficient time before the October 21, 2002 term of General Sessions Court for Oconee County, South Carolina to obtain an expert to assist him in preparing for the cross-examination of the witness, nor to obtain a responding expert witness to testify to refute, qualify or impeach the prosecution's expert's testimony, nor does defense counsel have sufficient time to thoroughly and adequately investigate Ms. Finley's background, qualifications, credentials, etc. . . . to determine whether she is, in fact, entitled to be qualified as an expert in and upon those matters to which she is to testify. Alternatively, in the event the Court should deny the motion to suppress the testimony, Defendant further moves for an Order continuing the case beyond the October 21, 2002 term of General Sessions Court for Oconee County, South Carolina to allow defense counsel sufficient

time to obtain the services of an appropriate expert to assist him in preparing for the cross-examination of Ms. Finley, to obtain the services of a responding expert witness to testify to matters favorable to the Defendant upon those same matters to be testified to by Ms. Finley, and to permit him adequate time to thoroughly investigate Ms. Finley's background, qualifications, credentials, etc. . . . so that he may determine whether she is, in fact, an expert in and upon those matters to which she is to testify and/or to permit him to challenge the qualification of her as an expert witness.

AND I SO MOVE!

/s/ Larry C. Brandt
Larry C. Brandt
Attorney for Defendant

October 16, 2002
Walhalla, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF OCONEE	)	IN THE GENERAL SESSIONS COURT
State of South Carolina, Plaintiff, vs. William Max Nicholson, Defendant.	)	REQUEST FOR DISCLOSURE AND/OR PRODUCTION OF INFORMATION Arrest Warrant Nos.: G-856354; G-856355; G-856356

(Filed Feb. 14, 2002)

Pursuant to ***Rule 5 of the South Carolina Rules of Civil Procedure*** **and** ***Brady v. Maryland*****, 373 U.S. 83, 83 S.Ct. 1194 (1963)**, the Defendant, William Max Nicholson, by and through his undersigned counsel, hereby requests that the Prosecution disclose and make available for inspection and copying the following information:

1. Any relevant, written or recorded statements made by the Defendant or copies thereof within the possession, custody or control of the Prosecution, the existence of which is known or by the exercise of due diligence may become known to the attorney for the Prosecution.

2. The substance of any oral statement made by Defendant which the Prosecution intends to offer into evidence at the trial, whether before or after arrest, in response to interrogation by any person who was, or may be considered a prosecution agent.

3. All books, papers, documents, photographs, video films, tangible objects, or copies of portions thereof which are within the possession, custody or control of the Prosecution and which are material to the preparation of the defense or are intended for use by the prosecution as evidence in the Prosecution's case in chief at the trial or which were obtained from or belonged to the Defendant.

4. The names, addresses and phone numbers of all witnesses which the Prosecution intends to call at the trial of the case.

5. State whether any witness who has or will give testimony to any investigative agent or at trial has ever been psychiatrically hospitalized or undergone psychiatric examination, treatment, mental status examination, mental care or counseling of any nature and, if so, a list of names and addresses of the psychiatrists, counselors and hospitals and copies of any and all relevant records and reports.

6. Any and all inconsistent statements of any of the witnesses or statements made by witnesses, including law enforcement officers, who are expected to testify at trial and/or were present at the taking of any witnesses statement.

7. Any and all rap sheets or histories of arrests or convictions or any incident reports involving any State witness or any witness who may be called to testify at the trial in this matter, including but not limited to, Will Paul Wheeler, the alleged victim of the offenses charged.

8. Copies of any and all memoranda, notes reports, affidavits, correspondence to and from the various law enforcement agencies of the United States and all state, county, municipal and local law enforcement agencies regarding the investigation herein and/or the charges against the Defendant.

9. Any and all evidence in the actual or constructive possession of the State, County or municipality which is of a favorable character for the Defendant in this case and material to the issue of guilt or innocence or to punishment in this case, pursuant to the due process clause of the Fourteenth Amendment to the United States Constitution, including, but not limited to, the following materials:

   a. Any and all oral, written or recorded statements made by any person to the police or the Circuit Solicitor which tend to establish the Defendant's innocence, to mitigate punishment or to impeach, discredit or contradict the testimony of any witness who has given testimony to any investigative agency or is intended to give testimony to an investigative agency or at the trial of this matter, including any such statement from the alleged victims or arresting officer(s).

   b. All evidence which might lead to evidence tending to lessen the credibility of any of the potential witnesses for the State or municipality, or which in any

other way might tend to show that the Defendant is not guilty of the charges against him.

c. All information or material including, but not limited to, all police investigation reports or statements made to or by the police which tend to establish the Defendant's innocence, to mitigate punishment, or to impeach, discredit, or contradict the testimony of any witness whom the government or State will call at the trial of the cause. ***Giles v. Maryland*, 386 U.S. 66, 87 S. Ct. 793 (1967).**

d. The names and addresses of all persons known to the prosecution who *may* have information tending to establish the Defendant's innocence, mitigate punishment, or impeach, discredit, or contradict the testimony of any witness whom the State will call at the trial of the case.

10. All Oconee County School District records of Will Paul Wheeler, the alleged victim of the offenses charged.

This Request for Disclosure/Production shall be deemed to continue from the time of service until the time of trial of the action so that information sought which comes to the knowledge of or into the possession of the Prosecution after the initial responses and/or production of

information have been effected shall be promptly transmitted to the Defendant and/or his attorney.

RESPECTFULLY SUBMITTED,

LARRY C. BRANDT, P. A.
P.O. BOX 738
3691 BLUE RIDGE BOULEVARD
WALHALLA, SC 29691
864/638-6406

BY: /s/ Larry C. Brandt
Larry C. Brandt
Attorney for the Defendant

February 13, 2002
Walhalla, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF OCONEE	IN THE FAMILY COURT 94-DR-37-189
Bruce C. Wheeler, Plaintiff, -VS- Teresa Lemere, Defendant.	AFFIDAVIT OF WILLIAM WHEELER (Filed Apr. 15, 1994)

Personally appeared before me, the undersigned notary public, WILLIAM WHEELER, who, being duly sworn, testifies as follows:

"My name is Will Wheeler. I turned fourteen years old on March 25, 1994.

"I want to remain at my father's home. I will not go back and stay at my mother's home.

"The atmosphere in my mother's home got unbearable before she let me go stay with my father. My mother's husband, Andy Lemere, got to the point he was regularly yelling and cussing me for minor and trivial things.

"If I left my shoes on the floor he would scream at me rather than telling me to pick them up. He usually screamed rather than talking with me. He got to cussing me and saying "GD" and "FY" and he said I was sorrier than any nigger on earth. My mother would tell me I deserved it, and she would always take his side when he got onto me. He actually pushed me up against a wall and yelled into my face, and I did not deserve the abuse he was giving me. When I tried to talk to my mother about her

husband's abuse of me, she reprimanded me for speaking about it.

"I could not take the screaming my mother and her husband got into. My mother expected me to get mad at Andy when she was mad at him, and I did not want to get drawn into their fights.

"On one occasion Andy screamed at me in front of one of my friends, B.J., and his father told Andy he thought it was inappropriate to act like that in front of his son.

"I told my father and his lawyer that I will not go back and stay at my mother's home. I tried to tell her that, but she will not talk reasonably with me. I told my father's lawyer I would rather go to reform school than back to my mother's home. I want to see her and visit with her, but I will not stay there.

"I am disciplined and cared for at my father's house, and he and his wife talk to me about things I may have done wrong and how to correct my errors. They do not scream at me, and I respond to their reasonableness because I want to.

"My father hunts and fishes and makes things with me, and I like to be able to go and see his parents. I want to be able to go to West-Oak High School which is in my father's area."

"The foregoing is true to the best of my knowledge and belief."

/s/ William Wheeler
William Wheeler

SWORN TO BEFORE ME this
8th day of April, 1994

/s/ Sandra L. Lee
Notary Public for South Carolina
My Commission Expires: 5/12/96

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE FAMILY COURT
CASE NUMBER 94-DR-37-189

BRUCE C. WHEELER,

Plaintiff,

versus

TERESA LEMERE,

Defendant.

AFFIDAVIT OF TERESA LEMERE

(Filed Apr. 15, 1994)

PERSONALLY APPEARED BEFORE ME, Teresa Lemere, who being duly sworn deposes and states:

I am the mother of William Paul Wheeler (known as "Will"). Since 1985, I have had sole custody of Will. Will's father was granted reasonable visitation. From 1986 to 1988, visitation between Will and his father was traumatic for all of us. Will would either not go for visitation or he would have to be torn out of my house screaming.

In 1988, Bruce filed a contempt action against me. I took Will to see Dr. Paul Wood and we agreed to follow the recommendations of Dr. Wood. Dr. Wood found that Will was afraid of his father for good reason and recommended supervised visitation gradually phasing into more unsupervised relationships. The contempt action was dropped and the parties began following Dr. Wood's recommendation. For approximately 2 years, Will would go spend every other weekend with his paternal grandparents and Bruce would visit with Will there. After Bruce remarried, Will did spend the night with his father but, for the most part,

he still stayed the majority of the time with his grandparents.

From 1988 to 1993, there were various times that I would have trouble making Will go visit with his father. In 1993 I took him to visit with Kinley Sturkie to evaluate the situation. Will agreed that we would do whatever Dr. Sturkie suggested.

After the visit with Dr. Sturkie, Will's attitude toward visitation was somewhat improved and continued to be so until March of 1994 when Will got into trouble involving "counterfeit" drugs and was suspended from Walhalla Middle School. I took Will for a drug screening to make sure he was drug-free. This was very upsetting to Will; during the screening he said he wanted to go live with his father. Will was so upset that I agreed that he could go over for a few days, but only temporarily.

Will went to his father's house on March 7, 1994. Bruce said that his father, Will's grandfather, could carry Will to and from private school so that Will could make up the ten days suspension, even though the School Board said Will could go to Westminster Middle School. Bruce said that since he had already paid for the private school, Will should continue attending the private school through end of March. I felt that was a reasonable request.

I asked to see Will on the weekends, but Will said that Bruce and Will's grandparents had already made plans for him each weekend. I was going to get Will on April 5, 1994, but Bruce told me I "better not step foot in this yard until after the hearing." I told him to have Will's things ready; I did not want to bother him. He told me that if I came there would be a deputy sheriff waiting in the yard.

Will called me later that night and asked me why I had called over there and upset everybody. I told Will I had not intended to upset anyone. I just wanted him to come home. Will said he was just fine where he was. Since that time, I have tried to call Will several times, but I could never get an answer at the house.

I believe Will wants to live with his father because he is trying to avoid facing the repercussions of the cause for his suspension. The message Will is perceiving is that he can turn the attention towards another matter and get people to forget about his actions, and, therefore, suffer no consequences for them. Will knows that I am very concerned about his actions. I believe Bruce may be using this situation as a means of enticing Will to develop a stronger relationship with him.

I tried to explain to Bruce that all three of us should be making every effort to find out why Will did what he did; we should not be bartering for Will's affection at such a crucial time in Will's life. This is a time for him to learn that he is responsible for his actions. I want Will to understand why he needs to be disciplined.

I am deeply saddened that whereas I have always encouraged Will to visit with his father, Bruce does not offer me the same support. Instead, he makes me out to be the enemy. I do not believe that I should be punished because I want to discipline my son and do what is best for him, even though he may not like it at the time. I believe Will needs to be with me because I take such an active role in assuring he chooses the right path. I hope one day he will thank me.

/s/ Teresa Lemere
TERESA LEMERE

Sworn to before me this 13th day of April, 1994.

/s/ Mary R. Stoudemire
Notary Public of South Carolina
My commission expires: ___

Incomplete Sentences

Name: Will Wheeler Age: 12 Date: 5-6-92

1. If I could be an animal, I would like to be gorrila
2. I am happiest when I get my way
3. My favorite subject in school is social studies
4. I get the maddest when I get fussed at/picked on
5. I worry the most when I think about grades
6. When I grow up, I want to be Architect/Draftsman
7. The person who makes me happiest is my mom
8. I get scared when I think about getting shot
9. I am saddest when I make bad grades
10. The last time I had a bad dream, it was about getting mugged
11. The last time I cried, it was because I got in trouble
12. The best thing about me is My strength
13. The thing my mother likes best about me is my wit
14. The last big fight with my father was about him fussing for no reason
15. If I could change something about myself, it would be My father
16. The last big fight with my mother was about None
17. The thing my father likes best about me is ??
18. If I had three wishes, I would ask for diffrent dad, 1,000,000,000,000,000,000,000$ and infinitie wishes
19. If I were on a deserted island and could be with only one person, I would want Jason Sims with me.